Student Protests and Academic Freedom in an Age of #blacklivesmatter

PHILIP LEE*

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* Associate Professor of Law, David A. Clarke School of Law, University of the District of Columbia; B.A., Duke University, 1996; J.D., Harvard Law School, 2000; Ed.M., Harvard Graduate School of Education, 2012; Ed.D., Harvard Graduate School of Education, 2013. I would like to thank Bob O'Neil, John Brittain, Sue Lee, and Marc Johnson for their comments on earlier drafts of this Article, the UDC Law faculty for their feedback during a faculty scholarship presentation, John Jensen for his research assistance, and the editors of the *Ohio State Law Journal* for their editing work and helpful suggestions.

I. INTRODUCTION

Student activism[1] has been part of the fabric of American higher education since the eighteenth century.[2] Indeed, some scholars have called it "as American as apple pie."[3] From Harvard's "Great Butter Rebellion" in 1766 when students pushed for better food[4] to the multicultural movement of today when students have demanded increased diversity in student, staff, faculty, and curriculum,[5] students have long pressed to have their voices heard. Continuing in this tradition, we now live in an age of student activists who, by organizing through social media,[6] are getting more people involved in political conversations and causes than would otherwise be possible.[7] On reflecting upon the relationship

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[1] For this Article, I use the definition of "student activism" from Tony Chambers and Christine Phelps, who observe, "We recognize that there are acts of social and political engagement whose primary purpose is nonproductive destruction and disruption. But our discussion speaks to activist behaviors whose purpose is to create change in order to address perceived or real inequities between and among individuals, groups, and/or systems." Tony Chambers & Christine E. Phelps, *Student Activism as a Form of Leadership and Student Development*, 31 NASPA J. 19, 20 (1993).

[2] For a discussion of student activism in higher education, see generally STEVEN J. NOVAK, THE RIGHTS OF YOUTH: AMERICAN COLLEGES AND STUDENT REVOLT, 1798–1815 (1977); REBELLION IN BLACK AND WHITE: SOUTHERN STUDENT ACTIVISM IN THE 1960S (Robert Cohen & David J. Snyder eds., 2013); ROBERT A. RHOADS, FREEDOM'S WEB: STUDENT ACTIVISM IN AN AGE OF CULTURAL DIVERSITY (Johns Hopkins Paperbacks ed. 2000); JOY ANN WILLIAMSON, BLACK POWER ON CAMPUS: THE UNIVERSITY OF ILLINOIS, 1965–75 (2003); Christopher J. Broadhurst, *Campus Activism in the 21st Century: A Historical Framing*, NEW DIRECTIONS FOR HIGHER EDUC., Fall 2014, at 3; Philip Lee, *The Case of* Dixon v. Alabama*: From Civil Rights to Students' Rights and Back Again*, 116 TCHRS. C. REC. 1 (2014).

[3] FRANK L. ELLSWORTH & MARTHA A. BURNS, STUDENT ACTIVISM IN AMERICAN HIGHER EDUCATION 5 (1970).

[4] *See* SAMUEL ELIOT MORISON, THREE CENTURIES OF HARVARD, 1636–1936, at 117–18 (13th prtg. 2001); Corydon Ireland, *Harvard's Long-Ago Student Risings*, HARV. GAZETTE (Apr. 19, 2012), http://news.harvard.edu/gazette/story/2012/04/harvards-long-ago-student-risings/ [https://perma.cc/LC2A-PHFB].

[5] *See* RHOADS, *supra* note 2, at vii, 1–12; Philip Lee, *The Griswold 9 and Student Activism for Faculty Diversity at Harvard School in the Early 1990s*, 27 HARV. J. ON RACIAL & ETHNIC JUST. 49, 49 (2011).

[6] I refer to social media broadly as applications and websites that allow their users to generate and share content with each other.

[7] Twitter, for example, is known for its hashtag campaigns that bring attention to an issue and mobilize large groups of people. A hashtag is a word or phrase preceded by the hash or pound sign (#) that social media users can use to identify messages on specific topics. *See How To Use Hashtags*, TWITTER, https://support.twitter.com/articles/49309-using-hashtags-on-twitter# [https://perma.cc/78QH-4ZPC]. Hashtags were created organically by Twitter users as a means to search tweets based on message content. *Id.* When social media users tweet and retweet messages with the same hashtags, these hashtags start to trend and the issues that these messages are connected to become more visible to the public. *Id.* College activists around the country have used Twitter to communicate and organize. *See, e.g.*, *Being 'Black on Campus'—Frustrations Spread Across US*, BBC NEWS (Nov. 12, 2015),

between social media and political activism, John G. Palfrey noted, "Twitter and Facebook have played a crucial role in almost any mass protest in the last few years."[8] A recent example is #BlackLivesMatter.[9]

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http://www.bbc.com/news/blogs-trending-34799061 [https://perma.cc/5KXD-MJ5R] (describing how student activists are communicating and organizing through #BlackOnCampus across the country).

[8] Caroline M. McKay, *Facebook at Center of Egypt Protests*, HARV. CRIMSON (Feb. 3, 2011), http://www.thecrimson.com/article/2011/2/3/facebook-twitter-government-internet/ [https://perma.cc/UM7K-MWAN]. Indeed, protesters all over the world are using social media to communicate their goals and organize their tactics. *See, e.g.*, WAEL GHONIM, REVOLUTION 2.0: THE POWER OF THE PEOPLE IS GREATER THAN THE PEOPLE IN POWER: A MEMOIR (2012) (chronicling the role of social media in fomenting and supporting the protests behind Arab Spring); PHILIP N. HOWARD & MUZAMMIL M. HUSSAIN, DEMOCRACY'S FOURTH WAVE?: DIGITAL MEDIA AND THE ARAB SPRING (2013) (exploring the creative digital activism during Arab Spring); Pablo Barberá & Megan Metzger, *How Ukrainian Protesters Are Using Twitter and Facebook*, WASH. POST (Dec. 4, 2013), http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/12/04/strategic-use-of-facebook-and-twitter-in-ukrainian-protests/ [https://perma.cc/MXG8-Y2LG] (discussing how people are interacting with a Ukrainian protestor's Facebook page); *id.* ("The 2000 updates posted on the page since it was created have garnered close to 50,000 comments and over a million likes; and their content has been shared over 230,000 times."); Bezdomny, *Firechat Enables Activist Mesh Network in Hong Kong*, SHAREABLE (Oct. 20, 2014), http://www.shareable.net/blog/firechat-enables-activist-mesh-network-in-hong-kong [https://perma.cc/YY3D-RBFF] (detailing how protesters in Hong Kong are using the social media platform Firechat to create a peer-to-peer "meshnet" that makes government surveillance difficult because it is independent of mobile and Internet networks). And governments are trying to thwart them by banning or controlling access to social media. *See, e.g.*, Sebnem Arsu, *Turkey Threatens To Block Social Media over Released Documents*, N.Y. TIMES (Jan. 16, 2015), http://www.nytimes.com/2015/01/17/world/europe/turkey-threatens-to-block-social-media-over-released-documents.html (on file with *Ohio State Law Journal*) ("Turkish officials threatened to shut down Twitter in the country unless the social-media company blocked the account of a left-wing newspaper that had circulated documents about a military police raid on Turkish Intelligence Agency trucks that were traveling to Syria last January."); Tania Branigan, *China Intensifies Crackdown on Social Media with Curbs on Instant Messaging*, GUARDIAN (Aug. 7, 2014), http://www.theguardian.com/world/2014/aug/07/china-intensifies-social-media-crackdown-curbs-instanrt-messaging [https://perma.cc/LH3M-4M3H] ("China has issued tough new rules for mobile instant messaging services such as WeChat, expanding an internet crackdown that has already muzzled microblogs and websites in what it called a bid to promote 'true freedom of speech.'"); Melissa Etehad, *Why Are Twitter and Facebook Still Blocked in Iran?*, AL JAZEERA AMERICA: OPINION (Apr. 19, 2014), http://america.aljazeera.com/opinions/2014/4/iran-twitter-rouhaniinternetcensorship.html [https://perma.cc/LR62-BTZ4] ("Officially, access to social networks such as Twitter and Facebook is banned—leaving Iranians unable to legally access these sites. Iranians still find ways to access them by illegally downloading virtual private networks to bypass the state's Internet filtering system. According to Iran's Ministry of Sciences, 60 percent of Iranian university students use Viber and WeChat, and in a survey . . . of 2,300 people, 58 percent reported using Facebook regularly, and 37 percent said they used Google+.").

[9] Dani McClain, *The Black Lives Matter Movement Is Most Visible on Twitter. Its True Home Is Elsewhere*, NATION (Apr. 19, 2016), https://www.thenation.com/article/black-lives-matter-was-born-on-twitter-will-it-die-there/ [https://perma.cc/J3VC-67GK] ("Today's racial-

After George Zimmerman was acquitted of murder in July 2013 for the killing of Trayvon Martin, an unarmed African American teenager,[10] Alicia Garza, a special projects director for the National Domestic Workers Alliance and her friend, Patrisse Cullors, a community organizer working on prison reform, along with Opal Tometi, an activist for immigrant rights, developed the hashtag "#BlackLivesMatter."[11] Garza explained the purpose of her social media campaign as, "A call to action . . . . To make sure we are creating a world where black lives actually do matter."[12] She also stated, "We understand organizing not to happen online but to be built through face-to-face connections and relationships where we build the trust necessary to move as a collective and exercise our collective power in order to win changes in our lives."[13] Yet, social media has helped this effort by facilitating these face-to-face connections.[14]

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justice movement demands an end to the disproportionate killing of black people by law-enforcement officials and vigilantes, and seeks to root out white supremacy wherever it lives. Social media has allowed its members to share documentary evidence of police abuse, spread activist messages, and forge a collective meaning out of heartrending news. At certain key moments, Twitter in particular has reflected and reinforced the power of this movement."). Note that Twitter is just one tool, out of many, that activists can employ to communicate with others. Bijan Stephen explains:

> If you're a civil rights activist in 2015 and you need to get some news out, your first move is to choose a platform. If you want to post a video of a protest or a violent arrest, you put it up on Vine, Instagram, or Periscope. If you want to avoid trolls or snooping authorities and you need to coordinate some kind of action, you might chat privately with other activists on GroupMe. If you want to rapidly mobilize a bunch of people you know and you don't want the whole world clued in, you use SMS or WhatsApp. If you want to mobilize a ton of people you might not know and you do want the whole world to talk about it: Twitter.

Bijan Stephen, *How Social Media Helps Black Lives Matter Fight the Power*, WIRED, Nov. 2015, http://www.wired.com/2015/10/how-black-lives-matter-uses-social-media-to-fight-the-power/ [https://perma.cc/S4QX-F6H2]. And these tools continue to evolve.

[10] Lizette Alvarez & Cara Buckley, *Zimmerman Is Acquitted in Trayvon Martin Killing*, N.Y. TIMES (July 13, 2013), http://www.nytimes.com/2013/07/14/us/george-zimmerman-verdict-trayvon-martin.html (on file with *Ohio State Law Journal*).

[11] *See* Elizabeth Day, *#BlackLivesMatter: The Birth of a New Civil Rights Movement*, GUARDIAN (July 19, 2015), https://www.theguardian.com/world/2015/jul/19/blacklivesmatter-birth-civil-rights-movement [https://perma.cc/4PWU-T39H]; Jessica Guynn, *Meet the Woman Who Coined #BlackLivesMatter*, USA TODAY (Mar. 4, 2015), http://www.usatoday.com/story/tech/2015/03/04/alicia-garza-black-lives-matter/24341593/ [https://perma.cc/D3R2-CTTC].

[12] Day, *supra* note 11.

[13] Guynn, *supra* note 11.

[14] Day, *supra* note 11 ("The new movement is powerful yet diffuse, linked not by physical closeness or even necessarily by political consensus, but by the mobilising force of social media. A hashtag on Twitter can link the disparate fates of unarmed black men shot down by white police in a way that transcends geographical boundaries and time zones. A shared post on Facebook can organise a protest in a matter of minutes. Documentary photos and videos can be distributed on Tumblr pages and Periscope feeds, through Instagrams and Vines. Power lies in a single image. Previously unseen events become unignorable.").

Recently, #BlackLivesMatter facilitated communication with activists around the country, helping to mobilize a new wave of nation-wide activism around the police killings of Michael Brown, Eric Garner, and many others.[15] Protestors all over the country have connected with each other by posting and searching for this hashtag. James Taylor observed that "[#]Black Lives Matter" may be the most potent slogan since "Black Power," which Kwame Ture (formerly Stokely Carmichael) introduced to a crowd of civil rights activists almost fifty years ago.[16]

The #BlackLivesMatter movement has had real-world influence. For example, in the aftermath of highly publicized deaths of two African Americans at the hands of police officers—Michael Brown and Freddie Gray—it has pressured the Department of Justice to investigate the policing practices of Ferguson, Missouri and Baltimore, Maryland.[17] It has pushed states to remove the Confederate flag and other Confederate symbols from government buildings and public spaces.[18] It has forced politicians to address issues of racial justice and criminal justice reform.[19]

The movement has also influenced student activism for racial justice on university campuses. For example, in 2015, Harvard University students mobilized through #BlackLivesMatter and organized marches, panel discussions, teach-ins, and die-ins.[20] During the same time, on the opposite coast, at the University of California, Berkeley, students and community

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[15] Jonathan Capehart, *From Trayvon Martin to 'Black Lives Matter,'* WASH. POST (Feb. 27, 2015), http://www.washingtonpost.com/blogs/post-partisan/wp/2015/02/27/from-trayvon-martin-to-black-lives-matter/ [https://perma.cc/4QXX-DEJE].

[16] Guynn, *supra* note 11.

[17] *See* Susannah Cullinane, *Ferguson Commits to DOJ Reforms*, CNN (Mar. 18, 2016), http://www.cnn.com/2016/03/18/us/ferguson-justice-department-agreement-filed/index.html [https://perma.cc/LHG8-BHCP]; John Verhovek, *Justice Department Opens Investigation into Baltimore Death*, CNN (Apr. 21, 2015), http://www.cnn.com/2015/04/21/politics/justice-department-baltimore-death/ [https://perma.cc/P62Q-RHNQ].

[18] *See* Greg Botelho & Emanuella Grinberg, *Woman Climbs Pole, Removes Confederate Flag*, CNN (June 27, 2015), http://www.cnn.com/2015/06/27/politics/south-carolina-confederate-flag/ [https://perma.cc/UMU7-HDNZ] (detailing Bree Newsome's activism to remove the Confederate flag from the South Carolina capitol); Campbell Robertson et al., *Calls To Drop Confederate Emblems Spread Nationwide*, N.Y. TIMES (June 23, 2015), http://www.nytimes.com/2015/06/24/us/south-carolina-nikki-haley-confederate-flag.html (on file with *Ohio State Law Journal*) (discussing the intersection of #BlackLivesMatter and the efforts to remove the Confederate flag).

[19] Sara Sidner & Mallory Simon, *The Rise of Black Lives Matter: Trying To Break the Cycle of Violence and Silence*, CNN (Dec. 28, 2015), http://www.cnn.com/2015/12/28/us/black-lives-matter-evolution/ [https://perma.cc/8TSZ-8TK6].

[20] Nina Luo, *#blacklivesmatter*, HARV. CRIMSON: FIFTEEN MINUTES MAG. (Feb. 12, 2015), http://www.thecrimson.com/article/2015/2/12/scrutiny-black-lives-matter/ [https://perma.cc/5NSB-XMW6]; *see also* Christina Pazzanese, *After Ferguson, the Ripples Across Harvard*, HARV. L. TODAY (Mar. 5, 2015), http://today.law.harvard.edu/ferguson-ripples-across-harvard/ [https://perma.cc/5AXG-PKXQ].

members also held protests against racism as part of the #BlackLivesMatter movement.[21] Similar protests arose on college campuses all over the country.[22]

Social media has made it much easier for college students to voice their opinions and engage in campus protest. But what right do students have to engage in campus activism? How should colleges and universities balance the multiple interests at stake when students engage in protest? Although the illustrating example I chose for this Article centers on racial justice, my proposed student academic freedom protection would apply to other forms of activism as well.

In this Article, moving away from the First Amendment principles that would apply only to public institutions, I explore contractual student academic freedom as a broader protection for students to engage in their protest activities at both public and private universities. Most importantly, I argue that higher education institutions should codify a balancing test into free speech policies that takes into account this freedom—conceptualized as the students' freedom to learn and also participate in teaching others through their own learning—among other competing interests.

This Article proceeds in four parts. Part II analyzes the historical context of racial exclusion in American higher education and connects it to modern efforts to promote racial justice to illustrate a continuum of students pressing for this type of change. Part III outlines the inadequacies of student academic freedom as articulated by courts defining this freedom in relation to the First Amendment. Part IV proposes a new mechanism based on contract law that would incorporate major higher education policy statements on student academic freedom that conceptualize this freedom through a learning principle as legally binding obligations between universities and their students. Finally, Part V explores how my proposed student academic freedom would balance the tensions between free speech and student demands for racial justice by employing a test that takes both "the marketplace of ideas" and student freedom to learn into account. My thesis is that colleges and universities should move away from the question, "how do we stop our student activists," and start asking, "what are students learning from their activism and what, in turn, can our institutions learn from it?"

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[21] Delency Parham, *Protesters Rally in Berkeley To Show Solidarity with Black Students Across the Nation*, BERKELEYSIDE (Nov. 19, 2015), http://www.berkeleyside.com/2015/11/19/protesters-rally-in-berkeley-in-solidarity-with-black-students-across-the-nation/ [https://perma.cc/LW4G-9JMW].

[22] Anemona Hartocollis & Jess Bidgood, *Racial Discrimination Protests Ignite at Colleges Across the U.S.*, N.Y. TIMES (Nov. 11, 2015), http://www.nytimes.com/2015/11/12/us/racial-discrimination-protests-ignite-at-colleges-across-the-us.html (on file with *Ohio State Law Journal*).

II. THE HISTORICAL CONTEXT OF RACIAL EXCLUSION ON AMERICAN COLLEGE CAMPUSES

To make sense of contemporary student activism for racial equity and inclusion, it should be viewed in a historical context in which racial minorities were excluded from equal educational opportunities through state segregation laws.[23] These laws were upheld in *Plessy v. Ferguson* as constitutional under the Separate-But-Equal doctrine.[24]

A number of challenges to the exclusion of racial minorities in higher education, brought by students seeking educational equity and inclusion, started gaining traction in the 1930s to 1950s—the facts of these cases illustrate the degree of historical racial exclusion in American higher education.[25] While all of these cases occur off campus because excluded students were fighting for inclusion, they nonetheless illustrate that much can be learned about pressing societal issues by students fighting the status quo. For example, in *Missouri ex rel. Gaines v. Canada*, African American applicant Lloyd Gaines was refused admission to the University of Missouri Law School because of state segregation laws.[26] When he applied to the law school, he was rejected based on his race and referred to a funding program that enabled African American

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[23] *See, e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896) (upholding Separate-But-Equal law in Louisiana railroad car segregation law), *overruled by* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Lum v. Rice, 275 U.S. 78, 87 (1927) (applying *Plessy* to uphold the exclusion of Chinese American children from an elementary school designated for whites based on a Mississippi segregation law); *see also* RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA'S STRUGGLE FOR EQUALITY 28 (1975) ("Among the more insistently enforced sections of the black codes was the prohibition against teaching a slave to read or write or giving him or her pamphlets, not excluding the Bible or religious tracts. So apprehensive were members of the slavocracy about the great mischief that literacy might stir that in many states it was illegal to teach free as well as enslaved Negroes. And slave schools, of course, were unknown."). Note that educational exclusion was not the only tool of racial oppression. For Native American peoples, schools have historically been used as a white supremacist tool to eradicate indigenous cultures. *See* DAVID WALLACE ADAMS, EDUCATION FOR EXTINCTION: AMERICAN INDIANS AND THE BOARDING SCHOOL EXPERIENCE, 1875–1928, at 336–37 (1995) ("In the final analysis, the boarding school story constitutes yet another deplorable episode in the long and tragic history of Indian-white relations. For tribal elders who had witnessed the catastrophic developments of the nineteenth century—the bloody warfare, the near-extinction of the bison, the scourge of disease and starvation, the shrinking of the tribal land base, the indignities of reservation life, the invasion of missionaries and white settlers—there seemed to be no end to the cruelties perpetuated by whites. And after all this, the schools. After all this, the white man had concluded that the only way to save Indians was to destroy them, that the last great Indian war should be waged against children.").

[24] *Plessy*, 163 U.S. at 540 (upholding a statute that provided "that all railway companies carrying passengers in their coaches in this State, shall provide equal but separate accommodations for the white, and colored races").

[25] *See generally* KLUGER, *supra* note 23 (discussing racial exclusion in American education).

[26] Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337, 343 (1938).

state residents like himself to attend law schools outside of the state.[27] Gaines brought a successful challenge to the state's refusal to provide African Americans in-state legal education.[28] Gaines taught the University of Missouri Law School—and anyone who observed his struggle for inclusion—that racial segregation was not going to be accepted passively by the students who were being unfairly denied educational opportunities.

In *McLaurin v. Oklahoma State Regents*, George McLaurin, an African American student, was first denied admissions to the University of Oklahoma to pursue a doctorate in education because of his race, but was subsequently admitted to the university "upon a segregated basis."[29] McLaurin challenged the state-imposed conditions as constitutional violations.[30] These segregated conditions were described by the Court:

> [H]e was required to sit apart at a designated desk in an anteroom adjoining the classroom; to sit at a designated desk on the mezzanine floor of the library, but not to use the desks in the regular reading room; and to sit at a designated table and to eat at a different time from the other students in the school cafeteria.[31]

As the litigation was pending, the university altered the conditions in an attempt to comply with Separate-But-Equal in the following manner:

> For some time, the section of the classroom in which appellant sat was surrounded by a rail on which there was a sign stating, "Reserved For Colored," but these have been removed. He is now assigned to a seat in the classroom in a row specified for colored students; he is assigned to a table in the library on the main floor; and he is permitted to eat at the same time in the cafeteria as other students, although here again he is assigned to a special table.[32]

Although McLaurin was permitted to be physically present on campus, in order to comply with state law, he was not allowed to interact with any of his classmates in academic or social spaces.[33] The Supreme Court held that these conditions were constitutionally invalid.[34] McLaurin showed the University of Oklahoma, and American society as a whole, that separate was not equal and he

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[27] *Id.*

[28] *Id.* at 352.

[29] McLaurin v. Okla. State Regents, 339 U.S. 637, 638–39 (1950).

[30] *Id.* at 640.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 641 ("These restrictions were obviously imposed in order to comply, as nearly as could be, with the statutory requirements of Oklahoma. But they signify that the State, in administering the facilities it affords for professional and graduate study, sets McLaurin apart from the other students. The result is that appellant is handicapped in his pursuit of effective graduate instruction. Such restrictions impair and inhibit his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.").

[34] *Id.* at 642.

was willing to fight for better educational opportunities. Ada Lois Sipuel, another African American student, taught a similar lesson in her successful lawsuit against the racially segregated University of Oklahoma School of Law.[35]

In *Sweatt v. Painter*, African American student Heman Sweatt was refused admission to the University of Texas Law School because of state laws that banned racial integration in higher education.[36] Instead, the state established a separate law school for African American students where Sweatt refused to enroll.[37] Sweatt brought a successful equal protection challenge based on the egregious educational disparities between the two schools and was ordered admittance to the University of Texas Law School.[38] Sweatt taught the University of Texas Law School, and others, that separate was not equal and he was willing to fight for both the tangible and intangible educational benefits that were denied to him by Jim Crow laws.

In sum, the student plaintiffs in *Gaines*, *McLaurin*, *Sipuel*, and *Sweatt* had much to teach both higher education and society in general. They achieved their legal victories in the framework of Separate-But-Equal—they won because the states were unable to show equal facilities.[39] The final blow to Separate-But-Equal would not happen until 1954 in *Brown v. Board of Education*.[40]

Even after *Brown*, however, a number of federal district courts continued to hear challenges to the categorical exclusion of African Americans at American colleges and universities. These cases are telling. In *Lucy v. Adams*, the University of Alabama refused to admit Autherine Lucy because she was African American.[41] The district court enjoined the university from refusing her

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[35] Sipuel v. Bd. of Regents of Univ. of Okla., 332 U.S. 631, 632–33 (1948) (per curiam).

[36] Sweatt v. Painter, 339 U.S. 629, 631 n.1 (1950).

[37] *Id.* at 632.

[38] *Id.* at 633–34 ("Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.").

[39] Note that none of these cases overruled *Plessy*.

[40] Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) ("We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal.").

[41] Lucy v. Adams, 134 F. Supp. 235, 235 (N.D. Ala. 1955), *aff'd*, Adams v. Lucy, 228 F.2d 619 (5th Cir.), *cert. denied*, 351 U.S. 931 (1956). Note that Autherine Lucy was joined in the case by Polly Anne Myers, another African American plaintiff, who was also denied admission to the University of Alabama based on race. *Id.* at 237–38.

admission.[42] Despite the Fifth Circuit Court of Appeals affirming the district court ruling,[43] obstacles to enrollment remained firmly in place.[44] When Autherine Lucy attempted to start her college student life, the University of Alabama, claiming that it could not ensure Lucy's safety, suspended her after a mob prevented her from attending classes.[45] This pattern repeated itself throughout the 1950s and early 1960s, with some universities manufacturing arbitrary hurdles for African American students that precluded their enrollment.[46] Nonetheless, the excluded students continued to fight for fairness and inclusion, teaching colleges and universities that students could make a difference.

Seven years after *Brown*, James Meredith, an African American student, applied to the University of Mississippi in January 1961.[47] The university registrar rejected James Meredith's application claiming, among other things, that he did not seek admission in good faith because he did not submit the required certificates of good character from university alumni.[48] Meredith, not being able to obtain such certificates from any member of the all-white alumni body, instead submitted character affidavits from African Americans citizens of Mississippi whom he knew.[49] He repeatedly wrote the registrar seeking admission to the university.[50] After ignoring his numerous letters, the registrar responded that Meredith's application was insufficient.[51] The Fifth Circuit Court of Appeals concluded:

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[42] *Id.* at 239.

[43] Adams v. Lucy, 228 F.2d 619, 620 (5th Cir. 1955).

[44] *See* GENE ROBERTS & HANK KLIBANOFF, THE RACE BEAT 128–38 (2006).

[45] *Id.*

[46] *See, e.g.*, Holmes v. Danner, 191 F. Supp. 394, 401–02 (M.D. Ga. 1961) ("After a careful consideration of all of the evidence admitted at the trial, the court finds that, had plaintiffs been white applicants for admission to the University of Georgia, both plaintiffs would have been admitted to the University not later than the beginning of the Fall Quarter, 1960.").

[47] Meredith v. Fair, 305 F.2d 343, 346 (5th Cir. 1962).

[48] *Id.* at 346–48.

[49] *Id.* at 346. Meredith wrote to the registrar,

> I will not be able to furnish you with the names of six University Alumni because I am a Negro and all graduates of the school are White. Further, I do not know any graduate personally. However, as a substitute for this requirement, I am submitting certificates regarding my moral character from Negro citizens of my State.

Id. The failure to enroll any African American students was a common feature of many historically white universities across the South. *See, e.g.*, *Holmes*, 191 F. Supp. at 402 ("No Negroes have ever been enrolled at the University of Georgia, and, prior to September 29, 1950, no Negro had ever applied for admission. At the time of the trial only four Negroes, including plaintiffs, had made application for admission to the University, all on or since September 29, 1950, none of whom has yet been admitted.").

[50] *Meredith*, 305 F.2d at 346–47.

[51] *Id.* at 347–48.

> Reading the 1350 pages in the record as a whole, we find that James Meredith's application for transfer to the University of Mississippi was turned down solely because he was a Negro. We see no valid, non-discriminatory reason for the University's not accepting Meredith. Instead, we see a well-defined pattern of delays and frustrations, part of a Fabian policy of worrying the enemy into defeat while time worked for the defenders.[52]

The court admitted him to the university.[53] However, it would take President John F. Kennedy's mobilization and intervention of federal troops and U.S. marshals to force the university to open its doors to him.[54] Meredith, like his student activist predecessors before him, taught his institution and the rest of the country that students were willing to agitate with dogged persistence until racial inclusion had been achieved.

In the wake of the Civil Rights Movement, colleges' and universities' exclusionary tactics began to wane. Indeed, the late 1960s and 1970s ushered in unprecedented levels of racial minority enrollment in American higher education.[55] John R. Thelin observes:

> After the civil unrest associated with the assassination of Martin Luther King, Jr., and other incidents that brought racial tensions to the fore, numerous colleges and universities initiated measures to promote racial access and diversity. And enrollment patterns for African Americans and other minority groups indicated substantial change.[56]

Student activism for racial equity, in addition to the general social unrest of the late 1960s and 1970s, had a significant role in changing university admissions policies.[57] This student-led pressure for inclusion also created curricular changes. As minority enrollments increased and students continued to push for inclusion, colleges and universities began instituting ethnic studies programs to institutionalize the study of minority communities and

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[52] *Id.* at 361.

[53] *Id.*

[54] *See* CHARLES W. EAGLES, THE PRICE OF DEFIANCE: JAMES MEREDITH AND THE INTEGRATION OF OLE MISS 340 (2009).

[55] *E.g.*, CHRISTOPHER J. LUCAS, AMERICAN HIGHER EDUCATION 262 (2006) ("Black enrollment as a percentage of total students attending colleges and universities nationwide mounted steadily after the mid-sixties. By 1971, the figure stood at 8.4 percent; by 1977 it had risen to 10.8 percent of the total college enrollment. Between 1967 and 1974, for example, black enrollment in white institutions increased fully 160 percent, compared to a 34 percent increase in the black enrollment of traditionally black colleges and a 33 percent increase in total enrollment. The greatest numerical growth in black enrollment occurred in northern white colleges and universities.").

[56] JOHN R. THELIN, A HISTORY OF AMERICAN HIGHER EDUCATION 348 (2d ed. 2011).

[57] *See generally* RHOADS, *supra* note 2 (tracing the evolution of student activists on American campuses, seeking racial equity and inclusion).

perspectives.[58] This was a turbulent process. Cornel West observes, "The inclusion of African Americans, Latino/a Americans, Asian Americans, Native Americans and American women into the culture of critical discourse yielded intense intellectual polemics and inescapable ideological polarization that focused principally on the exclusions, silences and blindnesses of male, WASP cultural homogeneity."[59] Therefore, students' push for racial inclusion and equity transformed from being only about physical inclusion to campus spaces to increasing agitation for cross-racial respect and understanding. And it is in this historical context that students today are continuing the fight.

A recent example of student activism for racial justice that sparked a wave of related protests across the country occurred at the University of Missouri, which took inspiration in the #BlackLivesMatter protests in Ferguson.[60] In the 2014–2015 academic year, a series of student protests at the University of Missouri resulted in the resignations of the president of the University of Missouri System and the chancellor of the University of Missouri, Columbia campus.[61] The protests were primarily led by a student group named "Concerned Student 1950."[62] Concerned Student 1950 is a reference to the first year that the University of Missouri admitted African American students.[63]

Much of the protests focused on issues of racial justice on campus and in society. For example, after being subject to racial slurs by people in the back of

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[58] *See* MIKAILA MARIEL LEMONIK ARTHUR, STUDENT ACTIVISM AND CURRICULAR CHANGE IN HIGHER EDUCATION (2011) (analyzing how student activism helped bring about Women's Studies, Asian American Studies, and LGBTQ Studies); FABIO ROJAS, FROM BLACK POWER TO BLACK STUDIES: HOW A RADICAL SOCIAL MOVEMENT BECAME AN ACADEMIC DISCIPLINE (2007) (analyzing the interplay of student activism and the emergence of Black Studies); DAVID YAMANE, STUDENT MOVEMENTS FOR MULTICULTURALISM: CHALLENGING THE CURRICULAR COLOR LINE IN HIGHER EDUCATION (2001) (analyzing how student activism led to multicultural studies at the University of California, Berkeley and the University of Wisconsin, Madison).

[59] CORNEL WEST, THE CORNEL WEST READER 127 (1999).

[60] *See* John Eligon & Richard Pérez-Peña, *University of Missouri Protests Spur a Day of Change*, N.Y. TIMES (Nov. 9, 2015), http://www.nytimes.com/2015/11/10/us/university-of-missouri-system-president-resigns.html?_r=0 (on file with *Ohio State Law Journal*) ("Many of the students and faculty members who took part in demonstrations had also been inspired by the protest movement sparked last year in Ferguson, a suburb of St. Louis, after a white police officer there killed Michael Brown, an unarmed black man, and they were experienced at using social media in organizing. They saw themselves as part of a continuum of activism linking Ferguson, other deaths at the hands of police, protests on campuses around the country and the Black Lives Matter movement.").

[61] Michael Pearson, *A Timeline of the University of Missouri Protests*, CNN (Nov. 10, 2015), http://www.cnn.com/2015/11/09/us/missouri-protest-timeline/ [https://perma.cc/9HEU-ZQAK]; Susan Svrluga, *U. Missouri President, Chancellor Resign over Handling of Racial Incidents*, WASH. POST (Nov. 9, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/11/09/missouris-student-government-calls-for-university-presidents-removal/ [https://perma.cc/8TX8-EPBR].

[62] *See* Pearson, *supra* note 61.

[63] *Id.*

a passing pickup truck, student body president Payton Head wrote a Facebook post in which he stated, "For those of you who wonder why I'm always talking about the importance of inclusion and respect, it's because I've experienced moments like this multiple times at THIS university, making me not feel included here."[64] This post went viral and led to a series of student rallies that the students called "Racism Lives Here."[65] The students found the university president's response to their grievances insufficient.[66]

Concerned Student 1950 issued a number of demands, including an apology from and resignation by the university president and a number of steps to increase racial diversity and understanding on campus.[67] After more racial turmoil, including an unknown vandal smearing feces in the shape of a swastika on a wall in a dorm bathroom, an African American graduate student named Jonathan Butler launched a hunger strike.[68] He vowed not to eat until the university president resigned.[69] Adding additional pressure to the university president, African American football players at the university subsequently announced that they would neither practice nor play until the president resigned.[70] These collective protests led to the resignations of both the

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[64] *Id.*

[65] *Id.*; *see also Before Protests, University of Missouri Saw Decades of Racial Tension*, CHI. TRIB. (Nov. 11, 2015), http://www.chicagotribune.com/news/nationworld/ct-missouri-protests-20151110-story.html [https://perma.cc/F5G5-Z59J?type=image] ("Head's social media accounts of having racial slurs shouted at him from a passing pickup truck helped spark a renewed protest movement at Missouri that culminated Monday with the resignation of university system President Tim Wolfe. Hours later, the top administrator of the Columbia campus, Chancellor R. Bowen Loftin, was forced out.").

[66] Pearson, *supra* note 61.

[67] Megan Favignano, *UM President to Meet with Student Protestors; Students Give List of Demands*, COLUM. DAILY TRIB. (Oct. 23, 2015), http://www.columbiatribune.com/d457c737-64b0-5db1-b21d-11d07ef14917.html [https://perma.cc/ 4FUF-L4FF]; *see also* Rudi Keller, *Concerned Student 1950 Renews Demands as University of Missouri Curators Begin Presidential Search*, COLUM. DAILY TRIB. (Feb. 25, 2016), http://www.columbiatribune.com/article/20160225/News/302259884 [https://perma.cc/3FCP-Z4MA].

[68] *See* Pearson, *supra* note 61.

[69] *Id.*

[70] *Id.*; *see also* Marc Tracy & Ashley Southall, *Black Football Players Lend Heft to Protests at Missouri*, N.Y. TIMES (Nov. 8, 2015), http://www.nytimes.com/2015/11/09/us/missouri-football-players-boycott-in-protest-of-university-president.html?_r=0 (on file with *Ohio State Law Journal*). In direct response to the athletes' protest, a Missouri lawmaker proposed a bill that would terminate scholarships for student-athletes who refused to play for non-health related reasons. Dennis Dodd, *State Rep Blasts Mizzou, Players for Supporting Civil Rights Protests*, CBS SPORTS (Dec. 15, 2015), http://www.cbssports.com/college-football/news/state-rep-blasts-mizzou-players-for-supporting-civil-rights-protests/ [https://perma.cc/68N4-SMVR]. The bill was quickly withdrawn. *See* A.J. Perez, *Missouri Legislator Withdraws Bill To Bar Student Athletes from Protests*, USA TODAY (Dec. 16, 2015), http://www.usatoday.com/story/sports/college/2015/12/16/missouri-legislator-rick-brattin-withdraws-bill-bar-student-athlete-protests/77417410/ [https://perma.cc/ML2A-LA89].

university president and chancellor of the Columbia campus.[71] Concerned Student 1950 used Twitter to get its message out,[72] and connected college students around the country to push for racial equity and inclusion.[73] Given this

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[71] *See* Svrluga, *supra* note 61. Some professors also supported the protests. A prominent example is communications professor Melissa Click, who was fired for blocking a journalist from accessing a protest. Richard Pérez-Peña, *University of Missouri Fires Melissa Click, Who Tried To Block Journalist at Protest*, N.Y. TIMES (Feb. 25, 2016), http://www.nytimes.com/2016/02/26/us/university-of-missouri-fires-melissa-click-who-tried-to-block-journalist-at-protest.html (on file with *Ohio State Law Journal*). The American Association of University Professors subsequently issued an investigative report finding that Professor Click's academic freedom rights were violated by the university for firing her without a faculty review. Colleen Flaherty, *A Firing with Consequences*, INSIDE HIGHER ED (May 19, 2016), https://www.insidehighered.com/news/2016/05/19/aaup-finds-mizzou-compromised-academic-freedom-terminating-melissa-click [https://perma.cc/7RC8-KQ42] ("The Board of Curators of the University of Missouri System violated academic freedom in dismissing Melissa Click, a former assistant professor of communication studies at the Columbia campus, according to a new investigatory report by the American Association of University Professors. As a result, AAUP could vote to censure Mizzou's administration at the association's upcoming meeting." (citations omitted)). After its investigation, the AAUP placed the University of Missouri on its censure list. Colleen Flaherty, *Censures for Mizzou, Saint Rose*, INSIDER HIGHER ED (June 20, 2016), https://www.insidehighered.com/news/2016/06/20/aaup-votes-censure-two-institutions-alleged-violations-academic-freedom-and-calls [https://perma.cc/MSM3-QSKU].

[72] *See* ConcernedStudent1950 (@cs_1950), TWITTER, https://twitter.com/cs_1950?lang=en [https://perma.cc/YJ8Y-S6CW] (last updated Feb. 7, 2017); *cf.* Scott Jaschik, *Ultimatum on King Day*, INSIDE HIGHER ED (Jan. 21, 2014), https://www.insidehighered.com/news/2014/01/21/racial-tensions-grow-university-michigan [https://perma.cc/8U3Z-E6BZ] ("Last semester's #BBUM Twitter protest attracted nationwide attention, as students used the hashtag to describe their frustrations with 'being black at the University of Michigan.' Students described hostile or ignorant comments as everyday events in their lives, along with the reality that their numbers are small (not even 5 percent of the university's enrollment, though the state has a black population of more than 14 percent). The Twitter protest spread to other universities in the state, and Michigan officials said that they were 'listening' and concerned." (citation omitted)).

[73] *See, e.g.*, Brandon Griggs, *The Next Missouri? Ithaca College Students Stage Walkout*, CNN (Nov. 11, 2015), http://www.cnn.com/2015/11/11/us/ithaca-college-protest-racism-campus/ [https://perma.cc/G9SY-VLPT] ("Emboldened by recent upheavals at the University of Missouri, hundreds of Ithaca College students staged a walkout Wednesday to demand the resignation of President Tom Rochon, who they claim has not responded adequately to incidents of racism on campus."); Hartocollis & Bidgood, *supra* note 22 ("In interviews, students say they have been inspired by the Black Lives Matter movement that grew out of the fatal shooting of Michael Brown by the police in Ferguson, Mo. They say the victory of protesting students and football players at the University of Missouri has spurred them to demand that their universities provide a safe space for students of color."); Teresa Watanabe & Larry Gordon, *Claremont McKenna College Students Embrace a Lesson in Activism*, L.A. TIMES (Nov. 13, 2015), http://www.latimes.com/local/lanow/la-me-ln-students-claremont-mckenna-react-racial-tensions-20151113-story.html [https://perma.cc/K2GC-MZQU] ("Experts said protests at [Claremont McKenna College] are part of a wider trend that started with the Black Lives Matter movement and was brought to wide attention at the University of Missouri, where the football team's threat to strike unless racism was

context of increasing student activism for racial justice, what rights do students have to engage in such protests? In the next Part, I outline the constitutional contours of student academic freedom to highlight the inadequacy of such freedom when based on the First Amendment.

III. THE CONSTITUTIONAL STANDARD OF STUDENT ACADEMIC FREEDOM

Prior to 1961, courts refused to recognize students' rights because universities were viewed as acting *in loco parentis* (in the place of a parent) in relation to their students.[74] Universities and their professors were seen as akin to parents who were given vast discretion in building the morals of their students.[75]

Writing about *in loco parentis*, William Blackstone observed that a parent

> [M]ay also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.[76]

This concept was subsequently applied to American higher education. For example, in his inaugural address as the first president of Johns Hopkins University, Daniel Coit Gilman observed, "The college theoretically stands *in loco parentis*; it does not afford a very wide scope; it gives a liberal and substantial foundation on which the university instruction may be wisely built."[77] If a legal dispute arose, many courts gave deference to the colleges and universities in maintaining order and discipline among students—who were viewed as mere children.

One expression of the *in loco parentis* doctrine in court was *Gott v. Berea College*, in which the Kentucky Supreme Court upheld a rule forbidding

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addressed there led to the resignation of two top leaders."); Jenny Wilson, *Yale Students March To Protest Racism on Campus*, HARTFORD COURANT (Nov. 9, 2015), http://www.courant.com/education/hc-yale-racial-protest-1110-20151109-story.html [https://perma.cc/LVU8-3TSM?type=image] ("The 'March of Resilience' followed two weeks of protest at Yale, including an allegation that a fraternity turned a woman away from a party because she was not white and a fierce debate over culturally insensitive Halloween costumes. The Yale march was held hours after the president and the chancellor of the University of Missouri stepped down amid a controversy over race relations.").

[74] Philip Lee, *The Curious Life of* In Loco Parentis *at American Universities*, 8 HIGHER EDUC. REV. 65, 66 (2011).

[75] *Id.* at 69–70.

[76] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765–1769, at 441 (University of Chicago Press 1979).

[77] *Gilman's Inaugural Address*, JOHNS HOPKINS U., https://www.jhu.edu/about/history/gilman-address/ [https://perma.cc/L5A7-AZBL] (emphasis added) (quoting Daniel Coit Gilman's inaugural address as first president of Johns Hopkins University on February 22, 1876).

students from entering "[e]ating houses and places of amusement in Berea, not controlled by the college."[78] Berea College, a private institution in Kentucky, expelled some students for violating this rule because the students ate at a private restaurant not controlled by the college.[79] The restaurant owner challenged the rule as unlawfully harming his business.[80] The court upheld the rule, reasoning:

> College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.[81]

In another case, *John B. Stetson University v. Hunt*, the Florida Supreme Court upheld Stetson University's summary suspension of a female student for "offensive habits that interfere with the comforts of others."[82] The university claimed that the student was guilty of ringing cow bells, parading the halls of the dormitory at forbidden hours, and turning off the lights without permission.[83] The court, in upholding the suspension, reasoned:

> As to mental training, moral and physical discipline, and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.[84]

In a similar case at a state institution, Syracuse University expelled a student based on rumors that she was a troublemaker and that she was not "a typical Syracuse girl."[85] This student was dismissed without any notification of the

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[78] Gott v. Berea Coll., 161 S.W. 204, 205 (Ky. 1913).

[79] *Id.*

[80] *Id.*

[81] *Id.* at 206.

[82] John B. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924).

[83] *Id.* at 639.

[84] *Id.* at 640.

[85] Anthony v. Syracuse Univ., 231 N.Y.S. 435, 437 (N.Y. App. Div. 1928). Note that if this type of case occurred in New York today, two additional state-specific legal wrinkles would need to be addressed. First, the distinction between state and private universities may be murky due to a statute that authorizes private colleges and universities to contract with the state to provide educational services on behalf of the state. *See* N.Y. EDUC. LAW § 350(3) (McKinney 2009). This threshold inquiry is important because depending on whether the entity is deemed public or private, different legal standards would be applicable. For

charges against her or opportunity for a hearing.[86] The New York Appellate Division, consistent with the *in loco parentis* doctrine, observed:

> The university may only dismiss a student for reasons falling within two classes [set forth in the registration card that a student would have to sign before enrolling], one, in connection with safeguarding the University's ideals of scholarship, and the other in connection with safeguarding the University's moral atmosphere. When dismissing a student, no reason for dismissing need be given.[87]

In sum, during the heyday of *in loco parentis*, courts gave great deference to colleges and universities—both public and private—to shape the morals of their students.

The *in loco parentis* relationship at American colleges and universities changed after *Dixon v. Alabama State Board of Education*.[88] The Fifth Circuit Court of Appeals held in *Dixon* that students who were expelled from a state college for engaging in protests against racial segregation at the local courthouse were entitled to due process protection.[89] This case was to be the beginning of the end for *in loco parentis* at American colleges and universities.[90]

Courts from the early 1960s began to recognize the constitutional rights of students at public universities.[91] Even though students' rights have been

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example, the First Amendment only restricts state action. Second, a statutory mechanism called Article 78 exists in New York that allows challenges to "arbitrary and capricious" decision-making. *See* N.Y. C.P.L.R. §§ 7801–06 (McKinney 2008). Article 78 challenges apply to private colleges and universities. *See, e.g.*, Gertler v. Goodgold, 487 N.Y.S.2d 565, 569–70 (N.Y. App. Div. 1985) ("[H]aving accepted a state charter and being subject to the broad policy-making jurisdiction of the Regents of the University of the State of New York, a single corporate entity of which they are deemed a part, private colleges and universities are accountable in a CPLR Article 78 proceeding, with its well-defined standards of judicial review, for the proper discharge of their self-imposed as well as statutory obligations." (citations omitted)).

[86] *Anthony*, 231 N.Y.S. at 437.

[87] *Id.* at 440.

[88] Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

[89] *Id.* at 158–59.

[90] *See* Peter F. Lake, *The Rise of Duty and the Fall of* In Loco Parentis *and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 9 (1999) ("The 1961 decision of the Fifth Circuit in *Dixon v. Alabama* marked the beginning of the end for *in loco parentis* as an immunity insularizing the public (and later, indirectly, the private) college." (footnote omitted)).

[91] *See, e.g.*, Marzette v. McPhee, 294 F. Supp. 562, 562 (W.D. Wis. 1968) (applying constitutional due process rights to state university students); Dickey v. Ala. State Bd. of Educ., 273 F. Supp. 613, 613–14 (M.D. Ala. 1967) (applying First Amendment principles to state college students), *vacated*, Troy State Univ. v. Dickey, 402 F.2d 515 (5th Cir. 1969); Hammond v. S.C. State Coll., 272 F. Supp. 947, 947 (D.S.C. 1967) (same); Knight v. State Bd. of Educ., 200 F. Supp. 174, 174 (M.D. Tenn. 1961) (applying Fourteenth Amendment due process analysis to public university students).

protected since *Dixon*,[92] legal scholars disagree as to whether student academic freedom based on constitutional law exists. On the one hand, J. Peter Byrne argues that "no recognized student rights of free speech are properly part of constitutional academic freedom, because none of them has anything to do with scholarship or systematic learning."[93] Byrne assumes that academic freedom is only about scholarship and systematic learning and that students do not contribute to either. He contends that "while the Constitution affords students at public institutions extensive civil rights, it affords them no rights of academic freedom at all."[94] On the other hand, Walter Metzger has a broader view of academic freedom and explores the symbiotic interplay between faculty freedom and student freedom.[95] He argues that "if the student bid for freedom were excluded, a major part of the constitutional story of academic freedom would go untold."[96] Metzger continues:

> Even if they did not stand as full equals before the law, teachers and students did enter into complex relationships, adversarial and symbiotic, that affected the kinds of freedom they could wrest from one another and from common opponents in a court of law. . . . In the end, it seems best to conclude that, in the academic freedom club, students qualify as special members. They form a kind of odd group in—"odd" because they are neither fish nor fowl, neither full-fledged citizens of the prime state nor contractual employees of the agent state; "in" because to keep them out would be anomalous and impoverishing.[97]

Metzger sought to highlight the complex interplay between faculty freedom and student freedom—sometimes converging and other times diverging—but nonetheless, always existing together. Consistent with Metzger's more nuanced view of student academic freedom, a number of court cases suggest, and even explicitly reference, academic freedom protection for students at public colleges

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[92] Note that *Dixon* only applied to students at public universities. In this regard, Brian Jackson observes:

> *Dixon v. Alabama* often is hailed as a pivotal rejection of the *in loco parentis* doctrine. But despite the *Dixon* decision, thousands of students at private universities remain outside the scope of constitutional protection. . . . As a result, actions by these schools cannot be attributed to the state for constitutional purposes. The *Dixon* decision thus left untouched thousands of students attending private colleges and universities. These students have no substantive or procedural constitutional safeguards.

Brian Jackson, Note, *The Lingering Legacy of* In Loco Parentis*: An Historical Survey and Proposal for Reform*, 44 VAND. L. REV. 1135, 1153–54 (1991) (footnotes omitted).

[93] J. Peter Byrne, *Academic Freedom: A "Special Concern of the First Amendment,"* 99 YALE L.J. 251, 262 (1989).

[94] *Id.* at 263.

[95] Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1305 (1988).

[96] *Id.*

[97] *Id.*

and universities. Although none of these cases deal explicitly with student activism, they all recognize that the special context of higher education creates heightened constitutional protections for students.

The United States Supreme Court has acknowledged that students at public colleges and universities have certain rights based on their status as higher education students in conjunction with First Amendment principles. For example, in 1957, the Court held in *Sweezy v. New Hampshire* that a state investigation of a visiting lecturer at the University of New Hampshire, who was claimed to be a "subversive person"[98] for his classroom speech and political associations, was a violation of his due process and free association rights.[99] The Court noted, "We believe that there unquestionably was an invasion of petitioner's liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread."[100] The Court further observed, "*Teachers and students* must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[101]

In 1964, the Court decided *Baggett v. Bullitt*, a case in which professors, staff members, and students from the University of Washington challenged a state-mandated loyalty oath on First Amendment grounds.[102] The Court held that the oath requirement was unconstitutionally vague.[103] In a footnote, the Court recognized the students' interest in academic freedom in this case by noting:

> Since the ground we find dispositive immediately affects the professors and other state employees required to take the oath, and the *interests of the students at the University in academic freedom are fully protected by a judgment in favor of the teaching personnel*, we have no occasion to pass on the standing of the students to bring this suit.[104]

Eight years later, in *Healy v. James*, the Court held that Central Connecticut State College's refusal to recognize a campus chapter of Students for a Democratic Society as an official student organization was a violation of the students' First Amendment rights.[105] The Court, in ruling for the students, reasoned, "The college classroom with its surrounding environs is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom."[106] It noted:

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[98] Sweezy v. New Hampshire, 354 U.S. 234, 246 & n.11 (1957).
[99] *Id.* at 254–55.
[100] *Id.* at 250.
[101] *Id.* (emphasis added).
[102] Baggett v. Bullitt, 377 U.S. 360, 360 (1964).
[103] *Id.* at 369–72.
[104] *Id.* at 366 n.5 (emphasis added).
[105] Healy v. James, 408 U.S. 169, 169 (1972).
[106] *Id.* at 180–81.

> [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[107]

In 1995, the Court in *Rosenberger v. Rector & Visitors of the University of Virginia* held that the University of Virginia's denial of funding to a student-run Christian magazine, while secular student-run magazines received funding, amounted to unconstitutional viewpoint discrimination.[108] In so holding, the Court observed:

> The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.[109]

In other words, the Court was recognizing the special context of higher education, which called for heightened speech protections. However, when applying legal protections to students' expression, a number of tensions have arisen between students and both their institutions and their professors.

A. *Tension Between Academic Freedom of Students and Institutions*

The elements of institutional academic freedom were first set forth by Justice Felix Frankfurter's concurring opinion in *Sweezy*.[110] In that opinion, Justice Frankfurter defined the four essential freedoms of a university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[111] These four freedoms would become foundational pillars in later cases discussing an institution's academic freedom rights vis-à-vis students' rights.

Many of these disputes have arisen out of conflicts between students and university administrators or faculty members who are acting on behalf of the institution. For example, in *Regents of the University of Michigan v. Ewing*, the Court upheld a medical school's academic dismissal of a student.[112] The medical school refused to allow the student to retake a test after that student failed it.[113] Citing Justice Frankfurter's concurring opinion in *Sweezy*, the Court

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[107] *Id.* at 180 (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

[108] Rosenberger v. Rectors & Visitors of Univ. of Va., 515 U.S. 819, 832 (1995).

[109] *Id.* at 836.

[110] Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result).

[111] *Id.*

[112] Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 216 (1985).

[113] *See id.* at 221–28.

deferred to the educational judgment of the medical school to determine whether a student should be dismissed for academic reasons.[114] The student's rights in this situation were not part of the academic freedom analysis.

In 2000, the Court decided *Board of Regents of University of Wisconsin System v. Southworth*.[115] In *Southworth*, a group of students challenged the mandatory student activity fee that funded the operation of student organizations.[116] The students argued that the fee violated their First Amendment rights because they should have the choice not to fund student organizations that engage in political expression that is offensive to their personal beliefs.[117] The Court upheld the mandatory fee because it was administered in a viewpoint-neutral manner.[118] Of particular significance, in a concurring opinion written by Justice Souter and joined by Justices Stevens and Bryer, the Justices cited the law of academic freedom as a relevant source of law in adjudicating this dispute.[119] However, Souter's concurrence focused exclusively on the university's right to decide how it "discharge[s] . . . its educational mission."[120] Justice Souter further noted: "Our understanding of academic freedom has included not merely liberty from restraints on thought, expression, and association in the academy, but also the idea that universities and schools should have the freedom to make decisions about how and what to teach."[121] As in *Ewing*, student rights were not mentioned at all in this academic freedom analysis.

Similarly, in a case before a federal district court, *Yacovelli v. Moeser*, a number of University of North Carolina at Chapel Hill (UNC) students brought a Free Exercise Clause claim against the university to prevent it from assigning a book during freshman orientation that contained a positive portrayal of

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[114] *Id.* at 225–26. In a footnote, the Court acknowledged the potential conflict between institutional and professorial freedoms, noting: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students . . . but also, and somewhat inconsistently, on autonomous decision[-]making by the academy itself . . . ." *Id.* at 226 n.12. This tension is highlighted in cases where professorial and institutional interests diverge. *See* Philip Lee, *A Contract Theory of Academic Freedom*, 59 St. Louis U. L.J. 461 (2015) (discussing the dominant constitutional analysis that academic freedom protects academic institutions, but not individual professors).

[115] Bd. of Regents of the Univ. of Wis. Sys. v. Southworth, 529 U.S. 217 (2000).

[116] *Id.* at 226–27.

[117] *Id.* at 227.

[118] *Id.* at 234.

[119] *Id.* at 236–37 (Souter, J., concurring in the judgment) ("The question before us is thus . . . whether Southworth has a claim to relief from this specific viewpoint neutral scheme. Two sources of law might be considered in answering this question. The first comprises First Amendment and related cases grouped under the umbrella of academic freedom. Such law might be implicated by the University's proffered rationale, that the grant scheme funded by the student activity fee is an integral element in the discharge of its educational mission." (footnotes omitted)).

[120] *Id.* at 237.

[121] *Bd. of Regents*, 529 U.S. at 237.

Islam.[122] The district court gave deference to the university's educational judgment and dismissed the students' claim.[123] The court observed, "UNC, instead of endorsing a particular religious viewpoint, merely undertook to engage students in a scholarly debate about a religious topic. . . . Students were free to share their opinions on the topic whether their opinions be positive, negative or neutral."[124] Once again, the focus of the academic freedom analysis was on the institution's right to select readings for the students with no attention as to what rights students have in such situations.

Other higher education cases have applied another First Amendment case that arose in a public school (K–12) context—*Hazelwood School District v. Kuhlmeier*.[125] For example, in a case decided by the Ninth Circuit Court of Appeals, *Brown v. Li*,[126] a student at the University of California at Santa Barbara challenged the university's refusal to allow the student to include a "disacknowledgements" section in his master's thesis as a violation of his First Amendment rights.[127] This section stated, "I would like to offer special *Fuck You's* to the following degenerates for being an ever-present hindrance during my graduate career . . ." and identified a number of university administrators and others that supposedly thwarted his academic progress.[128] The Ninth Circuit Court of Appeals, citing *Hazelwood*, found for the university, noting that the "decision was reasonably related to a legitimate pedagogical objective: teaching Plaintiff the proper format for a scientific paper."[129] In addressing why *Hazelwood* was the relevant standard, the Ninth Circuit Court of Appeals explained:

> In view of a university's strong interest in setting the content of its curriculum and teaching that content, *Hazelwood* provides a workable standard for evaluating a university student's First Amendment claim stemming from curricular speech. That standard balances a university's interest in academic freedom and a student's First Amendment rights. It does not immunize the

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[122] Yacovelli v. Moeser, 324 F. Supp. 2d 760, 762 (M.D.N.C. 2004).

[123] *See id.* at 764.

[124] *Id.*

[125] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988). In addition, note that the Supreme Court has referenced the *Tinker* "substantial disruption" test in a First Amendment case involving students at a public college. Healy v. James, 408 U.S. 169, 190–91 (1972) (observing that a state college's denial of recognition for a student organization violated the First Amendment, in part, because there was no evidence that the organization would create a substantial disruption). The *Tinker* "substantial disruption" test arose in a K–12 free speech case and provides a framework in which a public school may legally restrict student speech. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (holding that a public school may regulate student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others"). In a future piece, I plan to analyze why the *Tinker* test is inadequate to protect student academic freedom in higher education.

[126] Brown v. Li, 308 F.3d 939 (9th Cir. 2002).

[127] *Id.* at 943.

[128] *Id.*

[129] *Id.* at 952.

> university altogether from First Amendment challenges but, at the same time, appropriately defers to the university's expertise in defining academic standards and teaching students to meet them.[130]

Hazelwood involved a high school student's First Amendment challenge to the removal of two articles in the school's newspaper.[131] One of the articles dealt with teen pregnancy and the other reported on the impact of divorce on some of the students.[132] The principal decided to remove the articles because he was worried about the appropriateness of the subject matter to this high school student audience and the confidentiality of the people mentioned in the articles.[133] The Court, in upholding the school's actions, held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities as long as their actions were reasonably related to legitimate pedagogical concerns."[134] The Court recognized the relevance of the age of the young students in a K–12 setting by observing that:

> [A] school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting.[135]

However, the Ninth Circuit Court of Appeals' reliance on *Hazelwood*'s "legitimate pedagogical concerns" standard is misplaced. Specifically, First Amendment principles arising from K–12 settings have been ill suited to protect student academic freedom at American colleges and universities because they fail to take into account the special context of American higher education. Rather than effectively balancing all of the competing interests—between institutions, students, and professors—*Hazelwood* only asks what pedagogical interests—i.e., teaching-related interests—are at stake. This downplaying of students' interests will be further apparent in conflicts between students and their professors.

B. *Tension Between Academic Freedom of Students and Professors*

In many situations, academic freedom for both students and professors has been aligned. For example, in *Crue v. Aiken*, the plaintiffs were "a loose group of faculty members and a graduate teaching assistant," whose interests were

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[130] *Id.* at 951–52.
[131] Hazelwood v. Kuhlmeier, 484 U.S. 260, 264 (1988).
[132] *Id.* at 263.
[133] *See id.*
[134] *Id.* at 273.
[135] *Id.* at 272.

aligned against the institution, the University of Illinois.[136] Pursuant to athletic regulations, the university did not allow faculty or students to communicate with prospective student athletes.[137] The plaintiffs wanted to inform these prospective students about their views on a current controversy regarding the university's mascot named "Chief Illiniwek."[138] The Seventh Circuit Court of Appeals ruled in favor of the plaintiffs on First Amendment grounds.[139] In another case, *Southern Christian Leadership Conference v. Supreme Court of Louisiana*, law students and student organizations along with professors challenged a state supreme court rule that restricted the types of community groups that may be represented and solicited by law school clinics.[140] Although the plaintiffs lost their case,[141] their academic freedom rights were aligned in their fight against the state.

However, sometimes tension exists between students' and professors' academic freedom rights. Curricular decisions are a recent example. Courts have recognized that professors' rights to decide the content of a class generally supersede students' rights to do the same.[142] For example, in *Axson-Flynn v. Johnson*, a student at the University of Utah's Actor Training Program, who based on her religious beliefs, refused to take God's name in vain or use particular offensive words during classroom exercises.[143] The faculty members told her to "get over" her language issues and required her to read the words on the scripts.[144] She eventually left the acting program because she believed that she would have been dismissed.[145] The student challenged the university's attempt to force her to use certain words as a violation of her First Amendment rights.[146] The Tenth Circuit Court of Appeals, relying on the *Hazelwood* test, noted that this was "school-sponsored speech," and as such, the university's decision to compel that speech would be upheld as long as its decision was "reasonably related to legitimate pedagogical concerns."[147] The court remanded

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[136] Crue v. Aiken, 370 F.3d 668, 674 (7th Cir. 2004).

[137] *See id.* at 674–76.

[138] *Id.* at 674.

[139] *Id.* at 679–80.

[140] S. Christian Leadership Conference v. Supreme Court of La., 252 F.3d 781, 787–88 (5th Cir. 2001).

[141] *See id.* at 795 (affirming district court's judgment dismissing the action).

[142] A similar principle applies in the K–12 setting. *See, e.g.*, Settle v. Dickson Cty. Sch. Bd., 53 F.3d 152, 155–56 (6th Cir. 1995) ("So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere.").

[143] Axson-Flynn v. Johnson, 356 F.3d 1277, 1280 (10th Cir. 2004).

[144] *See id.*

[145] *See id.* at 1283.

[146] *See id.*

[147] *Id.* at 1290 (quoting Fleming v. Jefferson Cty. Sch. Dist., 298 F.3d 918, 926 (10th Cir. 2002)).

the case to determine whether the professors' treatment of the student was based on pedagogical grounds or a pretext for religious discrimination.[148]

Similarly, in *Head v. Board of Trustees of California State University*, a student in San Jose State University's teaching program, who disagreed with multiculturalism, challenged the professors' incorporation of multiculturalism in their classes as a violation of his First Amendment rights.[149] The court, citing to *Hazelwood*, found for the professors and held:

> Public university instructors are not required by the *First Amendment* to provide class time for students to voice views that contradict the material being taught or interfere with instruction or the educational mission. Although the *First Amendment* may require an instructor to allow students to express opposing views and values to some extent where the instructor invites expression of students' personal opinions and ideas, nothing in the *First Amendment* prevents an instructor from refocusing classroom discussions and limiting students' expression to effectively teach.[150]

This court's First Amendment analysis centered on a professor's freedom to teach. Student freedom was tangential to this interest.

As noted, both *Axson-Flynn* and *Head* employed *Hazelwood*'s "legitimate pedagogical concerns" standard in higher education contexts.[151] However, this approach applied to higher education is problematic in that it ignores any interest the students may have in academic freedom. Specifically, *Hazelwood* asks whether or not the institution or professor acted with a "legitimate pedagogical concern" and stops there. What is missing is a multisided balancing of interests. Taking into account the difference between K–12 and higher education students, a number of questions arise regarding the *Hazelwood* test. What about university and college students' interests—do they have any worth considering? How can a legal standard take into account the unique context of

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[148] *Id.* at 1301.

[149] Head v. Bd. of Trs. of Cal. State Univ., No. H029129, 2007 Cal. App. Unpub. LEXIS 393, at *4 (Cal. Ct. App. Jan. 18, 2007).

[150] *Id.* at *36. The court also recognized the academic freedom of the institution to incorporate multiculturalism into its curriculum:

> We discern nothing in *First Amendment* jurisprudence that precludes a public university from adopting, in its exercise of its academic freedom, academic standards that must be satisfied by a student seeking a professional teaching credential even where those standards reflect a certain philosophy of education or academic viewpoints with which a student vehemently disagrees.

Id. at *44–45.

[151] *Axson-Flynn*, 356 F.3d at 1289 ("[W]e hold that the *Hazelwood* framework is applicable in a university setting for speech that occurs in a classroom as part of a class curriculum."); *Head*, 2007 Cal. App. Unpub. LEXIS 393, at *35 ("Student speech in school-sponsored expressive activities may be restricted so long as the restrictions reasonably relate to legitimate pedagogical concerns."); *cf.* Bishop v. Aronov, 926 F.2d 1066, 1074–77 (11th Cir. 1991) (applying *Hazelwood* to faculty speech).

American higher education in balancing the competing interests? How can this standard be made applicable to both public and private institutions?

Given the differences between K–12 and higher education based on the varying ages of the students and correspondingly different purposes,[152] at least one court has refused to apply *Hazelwood* to a university context.[153] In *Kincaid v. Gibson*, Kentucky State University confiscated and banned the distribution of a student-edited yearbook because university administrators felt the publication to be of poor quality and inappropriate.[154] The district court relied, in part, on *Hazelwood* in holding for the university.[155] On appeal, the Sixth Circuit Court of Appeals, in reversing the district court, declined to follow *Hazelwood*, a case it described as "a case that deals exclusively with the First Amendment rights of students in a high school setting."[156] The Sixth Circuit Court of Appeals noted, "The university environment is the quintessential 'marketplace of ideas,' which merits full, or indeed heightened, First Amendment protection."[157] The court, thus, held for the students.[158]

The Sixth Circuit Court of Appeals was correct because it took into account the differences between K–12 students and higher education students—which are differences that have been acknowledged by the United States Supreme Court in prior cases.[159] In college and university settings, therefore, an alternative standard than *Hazelwood*'s "legitimate pedagogical concerns" test should apply. One possible approach is suggested by *Kincaid*, in which the Sixth Circuit Court of Appeals applied a traditional First Amendment doctrine—forum analysis—but did so in the special context of higher education. Forum analysis affords different levels of First Amendment protection depending on

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[152] *Compare* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986) (identifying "the objectives of public education [K–12] as the 'inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system'" (quoting Ambach v. Norwick, 441 U.S. 68, 77 (1979))), *with* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) ("The [university] classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943))).

[153] *See* Kincaid v. Gibson, 236 F.3d 342, 346 (6th Cir. 2001) (en banc).

[154] *Id.* at 345.

[155] *See id.* at 346.

[156] *Id.*

[157] *Id.* at 352.

[158] *See id.* at 357.

[159] *Compare* Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 683–84 (1986) ("By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked." (citations omitted)), *with* Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) ("University students, are, of course, young adults. They are less impressionable than younger students . . . .").

what type of forum was created by the state actor. The Supreme Court has recognized three types of public fora: 1) the traditional public forum; 2) the designated public forum; and 3) the nonpublic forum.[160] First, the traditional public forum is a place "which by long tradition or by government fiat ha[s] been devoted to assembly and debate," such as a street, sidewalk, or park.[161] In a traditional public forum, "the rights of the State to limit expressive activity are sharply circumscribed."[162] The Supreme Court has held:

> In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.[163]

Second, the designated public forum is a location that "the state has opened for use by the public as a place for expressive activity."[164] If a state has designated such a place, "it is bound by the same standards as apply in a traditional public forum."[165] Third, the nonpublic forum is "[p]ublic property which is not by tradition or designation a forum for public communication."[166] It is a place in which the government can and does close to the public for speech.[167] In a nonpublic forum, "[i]n addition to time, place, and manner regulations, the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[168]

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[160] Some scholars have analyzed the existence of a fourth category of public fora, "the limited public forum." *See, e.g.*, Norman T. Deutsch, *Does Anybody Really Need a Limited Public Forum?*, 82 ST. JOHN'S L. REV. 107, 108 (2008) (noting how some courts have acknowledged a limited public forum and detailing the problems with such a concept).

[161] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 44–46 (1983) ("At one end of the spectrum are streets and parks which 'have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" (quoting Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939))). Note that in *Perry*, forum analysis was applied to a school mail system, which is not a physical location, but a metaphysical one. *Id.* at 46–47; *see also* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 830 (1995) ("The [Student Activities Fund] is a forum more in a metaphysical [sense] than in a spatial or geographic sense, but the same principles are applicable.").

[162] *Perry Educ. Ass'n*, 460 U.S. at 45.

[163] *Id.* (citations omitted).

[164] *Id.*

[165] *Id.* at 46.

[166] *Id.*

[167] *Id.*

[168] *Perry Educ. Ass'n*, 460 U.S. at 46.

Out of these three categories, the Sixth Circuit Court of Appeals in *Kincaid* found that the student yearbook was a designated public forum because the university "intended to open the forum at issue."[169] The court found that the special context of higher education informed its decision on why the university intended the yearbook to be a forum for public communication.[170] The court observed:

> The university is a special place for purposes of First Amendment jurisprudence. The danger of "chilling . . . individual thought and expression . . . is especially real in the University setting, where the State acts against a background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition."[171]

However, this contextual inquiry of what type of forum the university intended focused entirely on the characteristics of the university, as an institution. Student academic freedom, on the other hand, was not explicitly mentioned.

The Supreme Court has also applied forum analysis to other types of student expression cases within colleges and universities. For example, in *Widmar v. Vincent*, the Court struck down the University of Missouri at Kansas City's regulation that prohibited the use of campus facilities by religious student groups as a violation of the students' First Amendment rights.[172] In finding a limited public forum, the Court noted, "Through its policy of accommodating their meetings, the University has created a forum generally open for use by student groups. Having done so, the University has assumed an obligation to justify its discriminations and exclusions under applicable constitutional norms."[173] The Court found the University of Missouri's regulation unconstitutional.[174] Even though the university regulation was struck down, the Court acknowledged institutional academic freedom rights in observing:

> Our holding in this case in no way undermines the capacity of the University to establish reasonable time, place, and manner regulations. Nor do we question the right of the University to make academic judgments as to how best to allocate scarce resources or "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." Finally, we affirm the continuing validity of cases . . . that recognize a university's right to exclude even First Amendment activities that

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[169] Kincaid v. Gibson, 236 F.3d 342, 348–49 (6th Cir. 2001). Note that the court uses the terms "designated public forum" and "limited public forum" interchangeably in its analysis. *Id.* at 348.

[170] *Id.* at 352.

[171] *Id.* (quoting Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 835–36 (1995)).

[172] Widmar v. Vincent, 454 U.S. 263, 277 (1981).

[173] *Id.* at 267.

[174] *Id.* at 277.

> violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.[175]

The Court was making it clear that even though certain student interests were protected against the university's policies in this case, institutional academic freedom was not affected by this holding. As in *Kincaid*, no mention was made of student academic freedom.

Decisions like *Widmar* and *Kincaid* are a better approach than *Hazelwood*, because at least the former cases take into account the special context of higher education. However, *Widmar* and *Kincaid* do not go far enough in recognizing the role of students' rights in applying that context to the constitutional standards. Instead these cases narrow their contextual analysis to the rights of institutions and faculty members, with little to no consideration of students' rights. This makes student academic freedom based on First Amendment principles insufficient.

An additional limitation of First Amendment doctrines in protecting student academic freedom is that this protection only applies to students at public universities.[176] Thus, constitutional protections are not available at private institutions.

What remains after these limitations is that the constitutional standard for student academic freedom is incomplete protection for students at public universities and no protection for students at private institutions. In the next Part, I turn to contract law for an alternative mechanism for protecting student academic freedom at both public and private universities.

IV. TOWARD A NEW CONTRACT STANDARD OF STUDENT ACADEMIC FREEDOM

A. *Contract Law as an Alternative Foundation*

Many colleges and universities explain the rights and obligations of their students as part of their college catalogs, student handbooks, institutional rules, and other sources. Some courts will interpret such documents as creating contractual obligations.[177] For example, in *Stahis v. University of Kentucky*, a

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[175] *Id.* at 276–77 (footnotes omitted) (citations omitted) (quoting Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)).

[176] The text of the First Amendment includes a state action requirement: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." U.S. CONST. amend. I.

[177] *See, e.g.*, Nungesser v. Columbia Univ., 169 F. Supp. 3d 353, 369–70 (S.D.N.Y. 2016) ("When a student is admitted to a university, an implied contract arises between the parties which states that if the student complies with the terms prescribed by the university, he will obtain the degree he seeks. The rights and obligations of the parties as contained in the university's bulletins, circulars and regulations made available to the student, become a

case involving a student who challenged his expulsion from a state medical school on breach of contract grounds, a Kentucky appellate court noted:

> Our Supreme Court has noted that the relationship between a private college and its students can be characterized as contractual in nature. We can discern no reason why the same rule cannot be applied to public universities, and are of the opinion that indeed an implied contract existed between [the student] and the University and/or College of Medicine in this case.[178]

As to the source of the obligations, the court recognized: "The rights and obligations of the parties as contained in the University's bulletins, circulars and regulations made available to the student become a part of the implied contract."[179]

Similarly, in *Corso v. Creighton University*, an expelled medical school student, Salvatore Corso, sued the school for breach of contract for failure to

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part of this contract." (quoting Vought v. Teachers Coll., Columbia Univ., 511 N.Y.S.2d 880, 881 (1987))); Doe v. Brown Univ., 166 F. Supp. 3d 177, 191 (D.R.I. 2016) ("Under Rhode Island law, '[a] student's relationship to his university is based in contract. The relevant terms of the contractual relationship between a student and a university typically include language found in the university's student handbook.' Rhode Island courts 'interpret such contractual terms in accordance with the parties' reasonable expectations, giving those terms the meaning that the university reasonably should expect the student to take from them.'" (quoting Havlik v. Johnson & Wales Univ., 509 F.3d 25, 34 (1st Cir. 2007))); Buescher v. Baldwin Wallace Univ., 86 F. Supp. 3d 789, 797–98 (N.D. Ohio 2015) ("[T]he long-standing principle that when a student enrolls in a college or university, pays his or her tuition and fees, and attends such school, the resulting relationship may reasonably be construed as being contractual in nature. The terms of such contract are found in the college catalog and handbook supplied to students." (quoting Jefferson v. Univ. of Toledo, No. 12AP-236, 2012 WL 4883203, at ¶ 15 (Ohio Ct. App. Oct. 16, 2012))); Wagner v. Holtzapple, 101 F. Supp. 3d 462, 487 (M.D. Pa. 2015) ("Pennsylvania law has clarified that 'the relationship between a private educational institution and an enrolled student is contractual in nature; therefore, a student can bring a cause of action against said institution for breach of contract where the institution ignores or violates portions of the written contract.' This contract is embodied by the written guidelines, policies, and procedures as contained in the written materials distributed to the student over the course of their enrollment in the institution, including the student handbook." (quoting Swartley v. Hoffner, 734 A.2d 915, 919 (Pa. Super. Ct. 1999))); Order Denying Defendant's Motion to Dismiss at 2, Barnes v. Bd. of Regents of the Univ. of Ga. Sys., No. 2012CV212942, 2012 WL 9506256 (Ga. Super. Ct. July 23, 2012) ("The Court finds the [student code of conduct] demonstrates an intent to enter into a binding agreement."), *rev'd sub nom.* Bd. of Regents of the Univ. Sys. of Ga. v. Barnes, 743 S.E.2d 609 (2013). *But see* Lucero v. Curators of the Univ. of Mo., 400 S.W.3d 1, 4–5 (Mo. Ct. App. 2013) ("While other jurisdictions have found a contractual relationship exists between a student and a university . . . the parties have not cited, nor has our research uncovered, any case law in Missouri that expressly finds the existence of a contractual relationship between a student and a university." (citations omitted)).

[178] Stathis v. Univ. of Ky., No. 2004-CA-000556-MR, 2005 WL 1125240, at *9 (Ky. Ct. App. May 13, 2005) (citations omitted).

[179] *Id.*

follow the procedure set forth in the student handbook.[180] The Eighth Circuit Court of Appeals observed:

> The relationship between a university and a student is contractual in nature. In order to establish his claim, Corso must prove that the University breached a contractual right. For our purposes, the Creighton University Handbook for Students 1981–82 [Student Handbook] is the primary source of the terms governing the parties' contractual relationship.[181]

In *Ross v. Creighton University*, a case involving a breach of contract claim by a college basketball player who alleged that he was denied any meaningful access to the academic curriculum, the Seventh Circuit Court of Appeals noted that "the 'basic legal relation between a student and a private university or college is contractual in nature. The catalogues, bulletins, circulars, and regulations of the institution made available to the matriculant become a part of the contract.'"[182]

In a Texas case involving a student's dispute with a public nursing school, the student claimed that the school breached its contract by forcing her to withdraw from the program based on different requirements than was contained in the university catalog at the time of her enrollment.[183] The Texas appellate court wrote, "We hold that a school's catalog constitutes a written contract between the educational institution and the patron, where entrance is had under its terms."[184] The Court of Appeals of Texas later distinguished this case from a dispute involving a student who was expelled for failing a required course.[185] The court held that "[i]n light of the express disclaimer in the [school catalog], no enforceable contract existed in the present case."[186] This holding suggests that all a college or university needs to do to avoid contractual obligations is insert disclaimers into its written materials. Indeed, some commentators advocate that schools follow this practice to avoid contractual liability.[187]

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[180] Corso v. Creighton Univ., 731 F.2d 529, 530 (8th Cir. 1984).

[181] *Id.* at 531 (footnotes omitted) (citations omitted).

[182] Ross v. Creighton Univ., 957 F.2d 410, 416 (7th Cir. 1992) (quoting Zumbrun v. Univ. of S. Cal., 101 Cal. Rptr. 499, 504 (Cal. Ct. App. 1972)). Courts have also held that faculty handbooks and other documents could similarly be deemed as contracts between professors and their institutions. *See, e.g.*, Sola v. Lafayette Coll., 804 F.2d 40, 45 (3d Cir. 1986) (treating the language in faculty handbook with a contractual status); Arneson v. Bd. of Trs., McKendree Coll., 569 N.E.2d 252, 256–57 (Ill. App. Ct. 1991) (holding that language in faculty handbook was legally binding); Brady v. Bd. of Trs., 242 N.W.2d 616, 619 (Neb. 1976) (holding that faculty employment letter and institutional bylaws were contractual).

[183] Univ. of Tex. Health Sci. Ctr. v. Babb, 646 S.W.2d 502, 504 (Tex. Ct. App. 1982).

[184] *Id.* at 506.

[185] Tobias v. Univ. of Tex., 824 S.W.2d 201, 211 (Tex. Ct. App. 1992).

[186] *Id.*

[187] *E.g.*, Sara Kupferer et al., *Student Handbooks: Are They Legally Binding Contracts?*, 13 CAMPUS SAFETY & STUDENT DEV. 11, 11 (2011) ("Good practice tips when writing an

However, some courts will interpret these documents in accordance with the unique context of higher education. For example, in a case involving professors claiming breach of contract, five nontenured faculty members were summarily terminated for their involvement in campus protests.[188] The faculty members argued "that the University failed in its obligation, incident to their contracts, to give the appropriate advance notice of non-renewal."[189] The university argued that a disclaimer in the handbook negated any contractual obligations arising from this document.[190] The D.C. Circuit Court of Appeals rejected the disclaimer, observing:

> Contracts are written, and are to be read, by reference to the norms of conduct and expectations founded upon them. This is especially true of contracts in and among a community of scholars, which is what a university is. The readings of the market place are not invariably apt in this non-commercial context.[191]

The D.C. Circuit Court of Appeals found in favor of the professors, noting that the faculty handbook gave the professors a contractual right to reasonable notice and an opportunity to be heard.[192]

Other courts, in disputes regarding students' rights, have nullified disclaimers contained in college catalogs based on unconscionability. For example, in *Gamble v. University System of New Hampshire*, a student brought a breach of contract claim against a public university for arbitrarily raising tuition after the registration deadline.[193] The Supreme Court of New Hampshire found that the disclaimer contained in the catalog was unconscionable.[194] The court observed, "It is inconceivable that the University could retain carte blanche authority to raise the tuition at any time during the semester for any amount it deems appropriate."[195] Finally, some courts will refuse to find explicit contracts based on disclaimers, but nonetheless, find obligations based on implicit agreements. For example, in *Southwell v. University of the Incarnate Word*, a nursing school student brought a breach of contract action against the school after she failed a required course and was not able to receive her degree as she planned.[196] A Texas appellate court found that while a disclaimer in the university bulletin was effective in negating an express contract, an implied contract nonetheless existed.[197] The court observed, "The specific terms of such

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institution's student handbook encourage the inclusion of a disclaimer stating that the handbook is not a legally binding contract between the student and the institution.").

[188] Greene v. Howard Univ., 412 F.2d 1128, 1129 (D.C. Cir. 1969).

[189] *Id.* at 1132.

[190] *Id.* at 1134.

[191] *Id.* at 1135.

[192] *Id.*

[193] Gamble v. Univ. Sys. of N.H., 610 A.2d 357, 359 (N.H. 1992).

[194] *Id.* at 361.

[195] *Id.*

[196] Southwell v. Univ. of the Incarnate Word, 974 S.W.2d 351, 353 (Tex. Ct. App. 1998).

[197] *Id.* at 356.

a contract must logically be defined by the college or university's policies and requirements."[198] As these cases suggest, some courts will find ways to find binding obligations between students and their institutions, even when disclaimers are in place. This approach is better than finding that a college or university is bound by no contractual obligations at all.

In the next Part, I address the question of what contractually-based academic freedom should entail. Specifically, I turn to the ways in which the American Association of University Professors has defined student academic freedom to elucidate how colleges and universities should conceptualize student academic freedom in their contracts with their students.

B. *American Association of University Professors' Standard of Academic Freedom*

When the terms of a higher education agreement are ambiguous, some courts turn to policy statements issued by the American Association of University Professors (AAUP) to determine the reasonable expectation of the parties. For example, in *Browzin v. Catholic University of America*, a professor of engineering was terminated due to the university claiming conditions of "financial exigency."[199] The parties agreed that the 1968 AAUP regulations were incorporated by the employment contract between the professor and university.[200] In resolving this dispute in favor of the university, the D.C. Circuit Court of Appeals relied on a number of AAUP materials outside the 1968 regulations to interpret the agreement, observing:

> Those materials include statements widely circulated and widely accepted by a large number of organizations involved in higher education (such as the 1925 Conference Statement and the 1940 Statement of Principles on Academic Freedom and Tenure), as well as guidelines and reports issued by the AAUP as a result of its investigations into incidents where principles of academic freedom or tenure have allegedly been violated. . . . As to the former documents—the widely accepted statements—the propriety of our considering them in interpreting the contract here could hardly be questioned. They form a kind of legislative history for the 1968 Regulations, and they do represent widely shared norms within the academic community, having achieved acceptance by organizations which represent teachers as well as organizations which represent college administrators and governing boards.[201]

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198 *Id.*

199 Browzin v. Catholic Univ. of Am., 527 F.2d 843, 845 (D.C. Cir. 1975).

200 *Id.*

201 *Id.* at 847 n.8. However, the D.C. Circuit Court of Appeals noted that "[t]he propriety of considering the latter category—the AAUP's guidelines and reports—however, is more problematic. Although the AAUP's investigations are noted for their thoroughness and scrupulous care, the reports remain the product of an organization composed of professors alone." *Id.* The court noted that due to the professor's failure to establish a prima facie case

As such, these documents can inform the ways in which the courts interpret contractual obligations between students and their colleges. Instead of waiting for legal disputes over vague terms, however, I propose that contracting parties explicitly codify student-related AAUP policies in their handbooks and institutional rules. In what follows, I briefly outline some of the major policy statements that the AAUP has formulated that relate to student academic freedom.

In 1915, the AAUP set forth its first policy statement on academic freedom titled the *General Report of the Committee on Academic Freedom and Academic Tenure* (1915 Declaration).[202] The 1915 Declaration recognized two traditional applications of academic freedom arising from the German model of higher education: "to the freedom of the teacher and to that of the student, *Lehrfreiheit* [to teach] and *Lernfreiheit* [to learn]."[203] However, the declaration's focus was almost exclusively on the teacher.[204] While remaining mostly silent on the student's freedom, it provided that professorial freedom entailed freedom of scholarly research and inquiry, classroom teaching, and speech and conduct outside the classroom.[205] Of note, there were limits to professorial freedom in relation to the students' right to learn.[206] For example, when teaching about "controversial matters," the professor was required to:

> [B]e a person of fair and judicial mind . . . he should cause his students to become familiar with the best published expressions of the great historic types of doctrine upon the questions at issue; and he should, above all, remember that his business is not to provide his students with ready-made conclusions, but to train them to think for themselves, and to provide them access to those materials which they need if they are to think intelligently.[207]

This limitation on professorial freedom evinced the AAUP's view that higher education, at its best, was the enabling of students to think critically and not forcing students to blindly accept dogmatic conclusions set forth by professors.[208]

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of contract breach based on the AAUP statement alone, it would not have to "delve more deeply into the applicability of the AAUP guidelines and reports." *Id.*

[202] Edwin R.A. Seligman et al., *General Report of the Committee on Academic Freedom and Academic Tenure: Presented at the Annual Meeting of the Association*, 1 BULL. AM. ASS'N U. PROFESSORS 15 (1915) [hereinafter *1915 Declaration*].

[203] *Id.* at 20.

[204] *Id.* ("It need scarcely be pointed out that the freedom which is the subject of this report is that of the teacher.").

[205] *Id.*

[206] *Id.* at 33.

[207] *Id.* at 33–34.

[208] *See 1915 Declaration*, *supra* note 202, at 35 ("The teacher ought also to be especially on his guard against taking unfair advantage of the student's immaturity by indoctrinating him with the teacher's own opinions before the student has had an opportunity fairly to examine other opinions upon the matters in question, and before he has sufficient knowledge and ripeness of judgment to be entitled to form any definitive opinion of his own.").

The AAUP further defined the contours of academic freedom in 1940, in a statement drafted together with the American Association of Colleges, titled the *Statement of Principles Concerning Academic Freedom and Tenure* (1940 Statement).[209] The 1940 Statement explained the purposes of tenure and explicated the details of professorial freedom set forth in the 1915 Declaration.[210] It also defined some limits on professorial academic freedom, once again in relation to the students' right to learn. For example, the statement noted that "teacher[s] [are] entitled to freedom in the classroom in discussing [their] subject, but [they] should be careful not to introduce into [their] teaching controversial matter which has no relation to [their] subject."[211] American higher education historian, Christopher J. Lucas, writes about the 1940 Statement: "In time, most colleges and universities accepted its broad outlines, and were reluctant to be found in noncompliance with its strictures."[212] Similar to the 1915 Declaration, the 1940 Statement remained mostly silent as to student freedom.

It was not until 1967 that the AAUP, in collaboration with several other higher education organizations, set forth a policy statement that specifically focused on student academic freedom titled the *Joint Statement on Rights and Freedoms of Students* (1967 Joint Statement).[213] The 1967 Joint Statement was written in a time of student revolt and activism on college and university campuses across the country. It was in the wake of the civil rights movement[214] and the beginning of the Black Power movement.[215] It was around the same

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[209] Am. Ass'n of Univ. Professors & Ass'n of Am. Colls., *Academic Freedom and Tenure: Statement of Principles, 1940*, 27 BULL. AM. ASS'N U. PROFESSORS 40, 40 (1941).

[210] *Id.* at 40–41.

[211] *Id.* at 41. An interpretive comment clarifying this language was issued in 1970 that provided:

> The intent of this statement is not to discourage what is "controversial." Controversy is at the heart of the free academic inquiry which the entire statement is designed to foster. The passage serves to underscore the need for teachers to avoid persistently intruding material which has no relation to [their] subject.

See Am. Ass'n of Univ. Professors & Ass'n of Am. Colls., *Academic Freedom and Tenure: 1940 Statement of Principles and Interpretive Comments*, 56 AAUP BULL. 323, 325 (1970).

[212] LUCAS, *supra* note 55, at 208. While most higher education institutions formally or informally adopted the 1940 Statement, I argue that colleges and universities should also adopt AAUP policies that specifically outline student academic freedom.

[213] Am. Ass'n of Univ. Professors, *Joint Statement on Rights and Freedoms of Students*, 53 AAUP BULL. 365 (1967) [hereinafter *1967 Joint Statement*].

[214] For a discussion of the civil rights movement, see generally BRUCE J. DIERENFIELD, THE CIVIL RIGHTS MOVEMENT (rev. ed. 2008); FREE AT LAST: A HISTORY OF THE CIVIL RIGHTS MOVEMENT AND THOSE WHO DIED IN THE STRUGGLE (Sara Bullard ed., 1989); FROM SIT-INS TO SNCC: THE STUDENT CIVIL RIGHTS MOVEMENT IN THE 1960S (Iwan Morgan & Philip Davies eds., 2012).

[215] For a discussion of the Black Power movement, see generally MARTHA BIONDI, THE BLACK REVOLUTION ON CAMPUS (2012); IBRAM H. ROGERS, THE BLACK CAMPUS

time as the Free Speech Movement at the University of California at Berkeley[216] and the inception of the student-led movement against the Vietnam War.[217] This was the time where student activists, en masse, were protesting on and off campuses in order to push for social change.

The purpose of the 1967 Joint Statement was "to enumerate the essential provisions for student freedom to learn."[218] Specifically, it outlined the academic freedom rights of students both inside and outside the classroom. Inside the classroom, the statement urged that "[t]he professor in the classroom . . . should encourage free discussion, inquiry, and expression," and that "[s]tudent performance should be evaluated solely on an academic basis, not on opinions or conduct in matters unrelated to academic standards."[219] The statement acknowledged, "Students should be free to take reasoned exception to the data or views offered in any course of study and to reserve judgment about matters of opinion, but they are responsible for learning the content of any course of study for which they are enrolled."[220]

The 1967 Joint Statement also provided guidance outside the classroom, particularly as it related to students' freedom of association.[221] It declared, "Students bring to the campus a variety of interests previously acquired and develop many new interests as members of the academic community. They should be free to organize and join associations to promote their common interests."[222] Moreover, the statement noted, "Students and student organizations should be free to examine and discuss all questions of interest to them, and to express opinions publicly and privately. They should always be free to support causes by orderly means which do not disrupt the regular and essential operation of the institution."[223]

The statement further recognized the academic freedom right of students to participate in institutional governance. It provided,

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MOVEMENT: BLACK STUDENTS AND THE RACIAL RECONSTITUTION OF HIGHER EDUCATION, 1965–1972 (2012).

[216] For a discussion of the Free Speech movement, see generally DAVID LANCE GOINES, THE FREE SPEECH MOVEMENT: COMING OF AGE IN THE 1960S (1993); Robert Cohen, *The Many Meanings of the FSM: In Lieu of an Introduction*, *in* THE FREE SPEECH MOVEMENT: REFLECTIONS ON BERKELEY IN THE 1960S 1 (Robert Cohen & Reginald E. Zelnik eds., 2002).

[217] For a discussion of the student-led Vietnam protests, see generally SIMON HALL, PEACE AND FREEDOM: THE CIVIL RIGHTS AND ANTIWAR MOVEMENTS IN THE 1960S (2005); TOM HAYDEN, THE PORT HURON STATEMENT: THE VISIONARY CALL OF THE 1960S REVOLUTION (2005); KIRKPATRICK SALE, SDS (1973).

[218] *1967 Joint Statement*, *supra* note 213, at 366.

[219] *Id.*

[220] *Id.*

[221] *Id.*

[222] *Id.*

[223] *Id.* at 366–67. The Joint Statement also provided, "Students should be allowed to invite and to hear any person of their own choosing. . . . The institutional control of campus facilities should not be used as a device of censorship." *Id.* at 367.

> As constituents of the academic community, students should be free, individually and collectively, to express their views on issues of institutional policy and on matters of general interest to the student body. The student body should have clearly defined means to participate in the formulation and application of institutional policy affecting academic and student affairs.[224]

Finally, the statement addressed students' rights, in general, both on and off campus. It observed that "students should enjoy the same freedom of speech, peaceful assembly, and right of petition that other citizens enjoy" and warned that "[f]aculty members and administrative officials should insure that institutional powers are not employed to inhibit such intellectual and personal development of students as is often promoted by their exercise of the rights of citizenship both on and off campus."[225]

In sum, based on the 1967 Joint Statement, academic freedom for students at American colleges and universities is freedom to actively engage in the learning process in the classroom, associate and organize with others on campus, express their ideas on and off campus, and meaningfully participate in institutional governance. These elements of student freedom are connected by one fundamental principal—*the student's freedom to learn.*

These elements should be incorporated into student handbooks, university catalogs, institutional rules, and other written materials to create contractual obligations for both universities and their students. I began this Article with an exploration of student activism for racial justice as the most salient example of contemporary student activism that is spreading across the nation. In order to explore how the learning principle contained in the AAUP 1967 Joint Statement could be applied to this example, I will analyze the tensions between "the marketplace of ideas" and demands for racial equity and inclusion that have arisen in recent campus disputes and suggest a balancing-test approach that incorporates students' rights in resolving this tension.

V. TENSION BETWEEN "THE MARKETPLACE OF IDEAS" AND STUDENT DEMANDS FOR RACIAL EQUITY AND INCLUSION

In *Keyishian v. Board of Regents*, the Supreme Court described the higher education classroom as "the marketplace of ideas."[226] *Keyishian* involved a challenge to a state-imposed loyalty oath for all state employees.[227] The case was brought by four university professors and a university librarian who also served as a part-time lecturer.[228] The Court struck down the loyalty oath

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[224] *1967 Joint Statement*, *supra* note 213, at 367.

[225] *Id.* The 1967 Joint Statement also outlines procedural standards in disciplinary proceedings. *Id.* at 367–68.

[226] Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

[227] *Id.* at 592.

[228] *Id.*

requirement (i.e., the Feinberg Law) as a violation of the First Amendment.[229] The Court recognized, "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[230]

Tension potentially exists between higher education as "the marketplace of ideas" and student demands for racial equity and inclusion.[231] The hope is that all ideas will be expressed and debated and the best ones will prevail. However, one student's speech disparaging racial minorities in the marketplace can impede another student's sense of inclusion and belonging on that campus and prevent that student from even participating in the dialogue. And one student's demands for inclusion and belonging can come at the expense of another student having to reflect on how his or her speech negatively affects others before speaking and chill speech in that way. In sum, there are a number of competing interests at stake when analyzing free speech issues. In order to provide concrete examples, I will detail two recent attempts to codify free speech on campus.

A. *Two Universities' Recent Attempts To Codify Free Expression on Campus*

1. *University of Chicago's Policy*

In July 2014, the president and provost of the University of Chicago asked free speech scholar Geoffrey R. Stone to lead a faculty committee on freedom of expression.[232] The committee was charged "'in light of recent events nationwide that have tested institutional commitments to free and open discourse' . . . to draft a statement 'articulating the University's overarching commitment to free, robust, and uninhibited debate and deliberation among all members of the University's community.'"[233]

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[229] *Id.* at 609. This case was the first to link academic freedom with the First Amendment. *Id.* at 603 ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.").

[230] *Id.* at 603.

[231] I say "potentially exists" because framed another way, "the marketplace of ideas" encompasses student protests and does not focus exclusively on the people who claim they are being silenced by such expression. For purposes of this Article, I use a definition of this concept that focuses on the free speech rights of people whose ideas the protestors are demonstrating against.

[232] Laura Demanksi, *Opening Inquiry*, U. CHI. MAG. (July–Aug. 2015), http://mag.uchicago.edu/university-news/opening-inquiry [https://perma.cc/QY2F-BX22].

[233] GEOFFREY R. STONE ET AL., REPORT OF THE COMMITTEE ON FREEDOM OF EXPRESSION (Jan. 2015) [hereinafter CHICAGO STATEMENT], https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf [https://perma.cc/3YJ9-DU65].

The committee's statement was released in January 2015.[234] Since the University of Chicago is a private institution, it is not restricted by the First Amendment. As such, the statement does not mention this amendment as a foundation for its principles.[235] Instead, the authors focus on policy considerations relevant to higher education.[236] If this document is legally binding, it will be based on state contract law.[237]

After briefly recounting the institution's historical dedication to free speech, it begins:

> Because the University [of Chicago] is committed to free and open inquiry in all matters, it guarantees all members of the University community the broadest possible latitude to speak, write, listen, challenge, and learn. Except insofar as limitations on that freedom are necessary to the functioning of the University, the University of Chicago fully respects and supports the freedom of all members of the University community "to discuss any problem that presents itself."[238]

The report acknowledges that ideas "will often and quite naturally conflict."[239] It continues:

> But it is not the proper role of the University to attempt to shield individuals from ideas and opinions they find unwelcome, disagreeable, or even deeply offensive. Although the University greatly values civility, and although all members of the University community share in the responsibility for maintaining a climate of mutual respect, concerns about civility and mutual respect can never be used as a justification for closing off discussion of ideas, however offensive or disagreeable those ideas may be to some members of our community.[240]

The statement focuses particular attention on the obligations of the university to not fetter speech. The statement then turns to the proper limits of speech by noting:

> The freedom to debate and discuss the merits of competing ideas does not, of course, mean that individuals may say whatever they wish, wherever they wish.

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234 *Id.*

235 *Id.*

236 *Id.*

237 *See, e.g.*, Holert v. Univ. of Chi., 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) (noting that the relationship between a student plaintiff and the University of Chicago is "strictly contractual in nature"); Raethz v. Aurora Univ., 805 N.E.2d 696, 699 (Ill. App. Ct. 2004) ("[I]n the student-university context, a student may have a remedy for breach of contract when it is alleged that an adverse academic decision has been made concerning the student but *only* if that decision was made *arbitrarily, capriciously, or in bad faith.*").

238 CHICAGO STATEMENT, *supra* note 233.

239 *Id.*

240 *Id.*

> The University may restrict expression that violates the law, that falsely defames a specific individual, that constitutes a genuine threat or harassment, that unjustifiably invades substantial privacy or confidentiality interests, or that is otherwise directly incompatible with the functioning of the University. In addition, the University may reasonably regulate the time, place, and manner of expression to ensure that it does not disrupt the ordinary activities of the University.[241]

The statement notes that these limits "are narrow exceptions to the general principle of freedom of expression, and it is vitally important that these exceptions never be used in a manner that is inconsistent with the University's commitment to a completely free and open discussion of ideas."[242] The statement then summarizes its main point, "In a word, the University's fundamental commitment is to the principle that debate or deliberation may not be suppressed because the ideas put forth are thought by some or even by most members of the University community to be offensive, unwise, immoral, or wrong-headed."[243] Again, the statement focuses on the university's commitment to open dialogue.

The statement emphasizes that "fostering the ability of members of the University community to engage in such debate and deliberation in an effective and responsible manner is an essential part of the University's educational mission."[244] Finally, it stresses:

> Although members of the University community are free to criticize and contest the views expressed on campus, and to criticize and contest speakers who are invited to express their views on campus, they may not obstruct or otherwise interfere with the freedom of others to express views they reject or even loathe. To this end, the University has a solemn responsibility not only to promote a lively and fearless freedom of debate and deliberation, but also to protect that freedom when others attempt to restrict it.[245]

Here, for the first time in the statement, obligations are imposed on the university committee as a whole.[246] While prior sections of the statement focused on the university's obligations and commitments, in this paragraph it imposes a duty on members of the university community, which the university will enforce when breached.[247] It prohibits members of the university community from any obstruction of or interference with on-campus speech.[248]

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241 *Id.*
242 *Id.*
243 *Id.*
244 CHICAGO STATEMENT, *supra* note 233.
245 *Id.*
246 *Id.*
247 *Id.*
248 *Id.* Note that the University of Chicago has a protest policy in place that provides, in part: "The right of freedom of expression at the University includes peaceful protests and

The popularity of the Chicago Statement is growing. Portions of it have already been adopted by Princeton University, a private institution, along with Purdue University, a public entity, and other colleges and universities.[249] Further, the Foundation for Individual Rights in Education has endorsed the statement and has been involved in a campaign to urge higher education institutions across the country to adopt it.[250]

2. *University of Minnesota's Policy*

On March 10, 2016, a faculty committee at the University of Minnesota, in a seven-to-two vote, provisionally approved and invited comment on a policy statement regarding free speech that has been hailed as "the strongest such affirmation seen on any campus."[251] This statement comes in the wake of several campus controversies—including incidents of protestors shouting down invited speakers and the university's investigation into an event poster that reproduced a controversial illustration of the prophet Mohammed from the French

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orderly demonstrations. At the same time, the University has long recognized that the right to protest and demonstrate does not include the right to engage in conduct that disrupts the University's operations or endangers the safety of others." *Student Manual: Protests & Demonstrations Policy*, U. CHI., https://studentmanual.uchicago.edu/protest [https://perma.cc/Y7J4-HD6V]. However, unlike the recent Chicago Statement that specifically addresses invited speaker interruption, this policy does not seem to contemplate that situation—that is, very few interruptions will rise to the level of interrupting university operations or endangering the safety of others. I surmise the existing policy was deemed insufficient to address speaker interruption so the new statement was used to articulate the university's stance on such interruption.

[249] Princeton Office of Communications, *Faculty Adopts Statement Affirming Commitment to Freedom of Expression at Princeton*, PRINCETON U. (Apr. 7, 2015), http://www.princeton.edu/main/news/archive/S42/84/36I47/index.xml?section=topstories [https://perma.cc/F7KQ-496J]; *Purdue Adopts 'Chicago Principles' To Protect Free Speech*, CHI. TRIB. (May 23, 2015), http://www.chicagotribune.com/news/local/breaking/ct-purdue-chicago-principles-free-speech-20150523-story.html [https://perma.cc/UUT6-4JLA]; *Universities and Free Speech: Hard To Say*, ECONOMIST (Jan. 30, 2016), http://www.economist.com/news/united-states/21689603-statement-heart-debate-over-academic-freedom-hard-say [https://perma.cc/8VPK-95Y8].

[250] Foundation for Individual Rights in Education, *FIRE Endorses University of Chicago's New Free Speech Statement*, FIRE (Jan. 7, 2015), https://www.thefire.org/fire-endorses-university-of-chicagos-new-free-speech-statement/ [https://perma.cc/45L2-HHK6]; Foundation for Individual Rights in Education, *FIRE Launches Campaign in Support of University of Chicago Free Speech Statement*, FIRE (Sept. 28, 2015), https://www.thefire.org/fire-launches-campaign-in-support-of-university-of-chicago-free-speech-statement-pr/ [https://perma.cc/V25Q-QCBR].

[251] Colleen Flaherty, *Free Speech Above All*, INSIDE HIGHER ED (May 10, 2016), https://www.insidehighered.com/news/2016/05/10/minnesota-faculty-senate-ponders-policy-making-free-speech-paramount [https://perma.cc/5GQ7-TF33]; *see also* Dale Carpenter, *Top Minnesota Faculty Committee Backs Free Speech Resolution*, WASH. POST (Mar. 11, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/03/11/top-minnesota-faculty-committee-backs-free-speech-resolution/ [https://perma.cc/T4Q8-YQ9M].

satire magazine Charlie Hebdo.[252] The proposed statement begins, "Ideas are the lifeblood of a free society and universities are its beating heart. If freedom of speech is undermined on a university campus, it is not safe anywhere. The University of Minnesota resolves that the freedom of speech is, and will always be, safe at this institution."[253]

The statement then enumerates four core principles. First, "*[a] public university must be absolutely committed to protecting free speech, both for constitutional and academic reasons.*"[254] The statement explains:

> As a public institution, the University of Minnesota has a constitutional obligation under the First Amendment to safeguard the freedom of speech. As an academic institution, the University must cultivate a community-wide norm of respect for free speech that goes beyond ensuring mere First Amendment compliance. . . . Every member of the University community—including administrators, faculty, offices, staff, and students—must respect both the right of others to speak and the right of listeners to hear that speech. No member of the University community has the right to prevent or disrupt expression.[255]

Of particular note in this section, the University of Minnesota is a state institution so its statement incorporates First Amendment principles in defining the contours of free speech.[256] At the same time, this public institution promulgates additional principles based on community-wide norms of being an academic institution.[257] This section also focuses on the obligations of both the institution and its individual members to ensure free speech. It proposes an absolute prohibition on speech disruption.[258]

Second, the statement provides, "*Free speech includes protection for speech that some find offensive, uncivil, or even hateful.*"[259] The statement elaborates:

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[252] Dale Carpenter, *Israeli Academic Shouted Down in Lecture at University of Minnesota*, WASH. POST (Nov. 4, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/11/04/israeli-academic-shouted-down-in-lecture-at-university-of-minnesota/ [https://perma.cc/TVM6-5LF4]. The author of this article, Dale Carpenter, is also a faculty member on the committee that subsequently developed the free speech statement. Alex Morey, *Minnesota Faculty Senate Committee To Consider Free Speech Resolution*, FIRE (Mar. 9, 2016), https://www.thefire.org/minnesota-faculty-senate-committee-to-consider-free-speech-resolution/ [https://perma.cc/QZ3N-M9TW]. In the article, Carpenter states that "there is no right to shout down a speaker at an academic lecture on the grounds of a public university." Carpenter, *supra*.

[253] Minnesota Faculty Consultative Committee, Free Speech at the University of Minnesota: Four Core Principles 1 (Mar. 10, 2016) [hereinafter Minnesota Principles], http://usenate.umn.edu/usenate/docs/160505free_speech_core_principles.pdf [https://perma.cc/RZU4-PWPD].

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *See id.* at 1–2.

[258] *See id.*

[259] Minnesota Principles, *supra* note 253, at 2.

> The shock, hurt, and anger experienced by the targets of malevolent speech may undermine the maintenance of a campus climate that welcomes all and fosters equity and diversity. But at a public university, no word is so blasphemous or offensive it cannot be uttered; no belief is so sacred or widely held it cannot be criticized; no idea is so intolerant it cannot be tolerated. So long as the speech is constitutionally protected, and neither harasses nor threatens another person, it cannot be prohibited.[260]

Third, the statement provides, "*Free speech cannot be regulated on the ground that some speakers are thought to have more power or more access to the mediums of speech than others.*"[261] The statement clarifies,

> The University may use its resources to ensure that community members have space and access to present differing viewpoints. But University officials . . . cannot assume the authority to pick and choose who may speak or how much they may speak based on the perception that some speakers have "too much" or "too little" power in public debate.[262]

Finally, the statement emphasizes, "*Even when protecting free speech conflicts with other important University values, free speech must be paramount.*"[263] The statement explains, "The University does not condone speech that is uncivil or hateful, and [University] officials should make this clear. Nevertheless, on those rare occasions when protecting expression conflicts with other values, like maintaining a climate of mutual respect on campus, the right to speak must prevail."[264]

The faculty committee later unanimously approved for further consideration a list of five recommendations to protect free speech on campus.[265] First, the recommendations propose that the university take steps to "[f]oster understanding of the meaning and value of free speech" by including the statement on free speech "in all orientation materials, all University catalogues, and all employee handbooks."[266] If this recommendation is implemented, these

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[260] *Id.*

[261] *Id.*

[262] *Id.*

[263] *Id.*

[264] *Id.*

[265] Dale Carpenter, *Top Faculty Committee at Minnesota Moves Speech Recommendations*, WASH. POST (May 3, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/03/top-faculty-committee-at-minnesota-moves-speech-recommendations/ [https://perma.cc/N9D4-DBEX].

[266] Minnesota Faculty Consultative Committee, Free Speech at the University of Minnesota: Recommendations 1 (Apr. 21, 2016) [hereinafter Minnesota Recommendations], http://usenate.umn.edu/usenate/docs/160505free_speech_recommendations.pdf [https://perma.cc/RZU4-PWPD].

written materials may later be deemed contractual in Minnesota.[267] Second, the recommendations urge that the university "[e]ncourage a climate of respectful debate about controversial topics," including "efforts to sponsor structured debates about controversial topics."[268] Third, the recommendations outline procedures to "[v]igorously protect free speech when serious disruption is anticipated or actually occurs."[269] Fourth, the recommendations advocate for the appointment of "a free speech-advocate whose role is to ensure that freedom of expression is respected and protected during any investigation in which the investigative office determines that all or part of the basis for the complaint is expression."[270] This recommendation is made in the aftermath of an investigation by the University of Minnesota's Office of Equal Opportunity and Affirmative Action (EOAA) based on complaints lodged by Muslim students.[271] It is a recommendation in which the idea that free speech is a paramount value—superseding all others—is most evident. The recommendation elaborates:

> Investigations by various University offices—including but not limited to EOAA and Human Resources—sometimes implicate free speech values. Yet despite the potential threat to free speech posed by such investigations, it is not clear that University investigatory offices see it as their duty to consider the effect of their investigations on the climate for free speech. They do not necessarily internalize the value of free speech at a public university. Their focus is on cleansing public discussion so that it is inoffensive. Otherwise, they fear, the University will be unwelcoming to some in the community. The effect is to create an imbalance by which protected speech is subordinated to other values. But speech may not be curtailed simply because it is offensive. And it is the duty of every member of the University community—including those with investigatory power—to respect and protect speech.[272]

This language frames the work of "investigatory offices"—such as the diversity and human resources offices—as pitted against free speech values and argues that such work compromises free speech because its purpose is to "cleanse" public discussion.[273] Thus, the recommendation urges the need of a free speech advocate to fight back against this perceived threat.[274] Finally, the

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[267] *See* Abbariao v. Hamline Univ. Sch. of Law, 258 N.W.2d 108, 113 (Minn. 1977) ("Elements of the law of contracts have been applied to the student-university relationship, but rigid importation of contractual doctrine has been rejected.").

[268] Minnesota Recommendations, *supra* note 266, at 1.

[269] *Id.* at 1–2.

[270] *Id.* at 3.

[271] Maura Lerner, *Poster for Free-Speech Forum Sets Off Debate at University of Minnesota*, STAR TRIB. (May 5, 2015), http://www.startribune.com/poster-for-free-speech-forum-sets-off-debate-at-university-of-minnesota/302689691/ [https://perma.cc/5YZ3-SE78].

[272] Minnesota Recommendations, *supra* note 266, at 2.

[273] *Id.*

[274] *Id.* at 3.

recommendations call for "minimum procedural protections for faculty, students, and others subject to investigation [that involve speech]."[275]

B. *What the Universities' Policies Omit—Student Activism as a Mechanism of Learning for Both Students and Their Colleges and Universities*

Insofar as the free speech statements from the University of Chicago and the University of Minnesota are based on policy considerations that are unique to higher education, there is an essential consideration that is absent from both statements. Specifically, they both fail to consider the academic freedom of the student protestors, in favor of an overarching institutional commitment to free expression on campus. The statements do this in a number of ways.

First, the statements assume that students' interests are necessarily aligned with an almost absolute commitment to free speech in "the marketplace of ideas." However, in some situations, the marketplace would include speech that does not amount to a tort or a crime, but nonetheless makes students of color feel degraded or unwelcome. And any response, including organized protests, from the students on the receiving end of such speech can easily be framed as an attack on the racist speaker's free speech rights in the marketplace. Thus, many students who are pushing for racial justice today are not comforted by appeals to embrace the First Amendment as the supreme guiding principle that will protect their interests. Instead, they see such appeals as antithetical to their interests. For example, in an open letter to the Wesleyan University community in the fall of 2015, a number of students of color, commenting on racial tensions on campus, wrote:

> When students of color speak our lives into existence, our speech comes under attack. When we defend our lives, we are harassing you. When we demand safety, we are attacking you. Our unapologetic voices are deranged screams; our open hands are clenched fists; our cellphones, weapons, our pigment, targets.
>
> Centering this conversation on free speech, without the context of the voices historically censored and misrepresented, is the very manifestation of systemic and structural racism that continues to silence and murder people of color.[276]

These student activists understand that a blind embrace of free speech principles is not, and has never been, an adequate solution to address their grievances. Indeed, they recognize the ways in which the free speech argument

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[275] *Id.* at 4.

[276] *An Open Letter to the Wesleyan Community from Students of Color*, WESLEYING (Sept. 25, 2015), http://wesleying.org/2015/09/25/an-open-letter-to-the-wesleyan-community-from-students-of-color/ [https://perma.cc/PJ5T-8XE5].

has been a tactic of "systemic and structural racism" that has been used against them in their fight for racial justice.[277]

These activists have strong historical precedents on their side in that free speech principles have not protected people of color from racism. For example, the First Amendment cozily existed with slavery and Jim Crow. It did nothing to protect the speech of slaves or the expression of racial minorities who were refused entry into the classrooms to speak. Specifically, to the extent there has been a "marketplace of ideas" at American college and university campuses, people of color have been legally excluded from the market for much of the history of these institutions.[278] One of the ways this exclusion occurred is that judges have not historically recognized any legal rights of people of African descent.[279] Another legal mechanism that enabled educational exclusion was the demonization of non-whiteness that served as a justification for the denial of legal rights to those people who possessed this status.[280]

Second, the policy statements create a bright-line rule restricting any disruption as an illegitimate form of protest without considering that sometimes at least limited disruption is a type of legitimate expression that conveys strong dissent. The bright-line rule does not allow the flexibility to take into account the protestor's right to use this form of expression. Writing when he was

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[277] *Id.*

[278] *See supra* Part II for analysis on the historical context of racial exclusion on American college campuses.

[279] *See, e.g.*, Dred Scott v. Sandford, 60 U.S. 393, 404–08 (1856) ("The question before us is, whether [people of African descent] compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word 'citizens' in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them. . . . They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.").

[280] *See* IAN HANEY LÓPEZ, WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE 27–77 (2006) (discussing how whiteness and non-whiteness—in particular, Asian-ness—were legally constructed to exclude non-white people from naturalization); Bethany R. Berger, *Red: Racism and the American Indian*, 56 UCLA L. REV. 591, 628–39 (2009) (detailing the unique ways in which racism excluded Native Americans from public institutions, even though the policies at the time—between 1871 to 1928—were touting assimilation); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1715–24 (1993) (analyzing how whiteness is a form of property that enabled its possessors to acquire and secure other forms of property while those who lacked it—specifically African Americans and Native Americans—have been denied such acquisition and security); Philip Lee, *Identity Property: Protecting the New IP in a Race-Relevant World*, 117 W. VA. L. REV. 1183, 1185–96 (2015) (discussing the interplay between whiteness and non-whiteness in which whiteness has been protected by law, while non-whiteness has been degraded).

president of the AAUP, Cary Nelson noted that "an interruption that signals extreme objection to a speaker's views is part of the acceptable intellectual life of a campus, but you have to let the speech go on."[281] Nelson later wrote, "Though briefly interrupting an invited speaker may be compatible with academic freedom, actually preventing a talk or a performance from continuing is not."[282] This is an effective balancing of interests, in that it allows the speaker to continue and finish, it allows the protestors to voice their strong objections—even to the point of briefly disrupting a speaker, and it allows the audience to hear all of these messages. A prohibition against any and all disruption fails to take into account the multiple interests involved in campus speech disputes.

Third, the statements assume that student dissent is something to be merely tolerated by the university community. This is problematic in that it ignores the ways in which student activism can be beneficial. In the alternative, I propose that student activism should be framed as a form of student learning and civic engagement and embraced as something that the community can learn from.

Student activism has a number of benefits for numerous stakeholders. For example, for students, activism is associated with a stronger sense of student leadership,[283] democratic citizenship,[284] civic engagement,[285] and higher levels of political involvement later in life.[286] Also, campus cultures conducive to student activism positively affect the student's development of critical thinking skills.[287] Further, even nonparticipating engaged observers of student activism—"individuals who are attentive to movement writings and activities, and express moral and even financial support for them, but who take no other action"[288]—have increased political participation later in life.[289] Finally, student activism can also have benefits for the institution by highlighting issues and

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[281] Scott Jaschik, *Is Heckling a Right?*, INSIDE HIGHER ED (Feb. 17, 2010), https://www.insidehighered.com/news/2010/02/17/heckle [https://perma.cc/2UW5-NZKH].

[282] Cary Nelson, *Defining Academic Freedom*, INSIDE HIGHER ED (Dec. 21, 2010), https://www.insidehighered.com/views/2010/12/21/defining-academic-freedom [https://perma.cc/RQ4Y-DCLL].

[283] *See* Chambers & Phelps, *supra* note 1, at 27.

[284] *See* Florence A. Hamrick, *Democratic Citizenship and Student Activism*, 39 J.C. STUDENT DEV. 449, 457 (1998).

[285] *See* J. Patrick Biddix et al., *Protest Reconsidered: Identifying Democratic and Civic Engagement Learning Outcomes*, 34 INNOVATIVE HIGHER EDUC. 133, 140–42 (2009).

[286] *See, e.g.*, Elizabeth R. Cole & Abigail J. Stewart, *Meanings of Political Participation Among Black and White Women: Political Identity and Social Responsibility*, 71 J. PERSONALITY & SOC. PSYCHOL. 130, 136 (1996).

[287] *See, e.g.*, Lisa Tsui, *Effects of Campus Culture on Students' Critical Thinking*, 23 REV. OF HIGHER EDUC. 421, 432 (2000). A professor at one of the studied institutions observed, "The campus culture here has to do with environmental concerns, social activism, and social justice. . . . As a result [the students] have to be able to examine issues." *Id.*

[288] Abigail J. Stewart et al., *Women and the Social Movements of the 1960s: Activists, Engaged Observers, and Nonparticipants*, 19 POL. PSYCHOL. 63, 63 (1998).

[289] *Id.* at 80.

grievances that would otherwise be unknown or misunderstood.[290] The causes that student activists choose to champion are reflections of how they are experiencing their institutions and their home communities. Therefore, student activism can serve to create spaces of learning where the university community—students, faculty, and staff—can be exposed to the issues underlying the students' grievances.

Although seen merely as annoyances by some administrators and faculty,[291] it actually benefits the student activists, student observers, and the institution itself. Thus, since the "marketplace of ideas"—as framed as a mechanism to protect people who say things offensive to racial and other minorities—is just one of many competing values, there should be some mechanism to acknowledge and consider the other values. In the next Part, I propose a balancing test that takes into account the students' academic freedom right to engage in such activism in two particular contexts—students interrupting invited speakers and students occupying buildings.

C. *Reconciliation: A Balancing Test*

Increasing numbers of students are engaging in student activism because email and social media platforms have provided innovative methods for student activists to express themselves, connect with others, and organize their activities.[292] Indeed, today's college freshman class is more likely to participate in student-led protests than in each of the nearly five decades that preceded it, including the freshmen of the 1960s and 1970s—two decades known for their campus activism.[293] Student activism, therefore, is becoming a normal part of the contemporary college experience.

College and university administrators appear to be at a crossroads. On the one hand, they can choose to create rules that cease and deter student activism;

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[290] *See* Hamrick, *supra* note 284, at 457 ("Dissenting students offer alternate opinions, conclusions, and judgments, allowing a broader range of perspectives and enriching subsequent dialogue. In terms of democratic political theory, the challenges to extant assumptions represented by this broader range of perspectives increases the potential that a campus can make considered, conscious decisions about what multiculturalism will mean on the campus.").

[291] *See, e.g.*, Anemona Hartocollis, *Student Protesters Self-Absorbed and Narcissistic, Oklahoma College President Says*, N.Y. TIMES (Dec. 1, 2015), http://www.nytimes.com/2015/12/02/us/student-protesters-self-absorbed-and-narcissistic-oklahoma-college-president-says.html (on file with *Ohio State Law Journal*).

[292] J. Patrick Biddix, *Technology Uses in Campus Activism from 2000 to 2008: Implications for Civic Learning*, 51 J.C. STUDENT DEV. 679, 684–88 (2010).

[293] *See* KEVIN EAGAN ET AL., COOP. INST. RESEARCH PROGRAM, THE AMERICAN FRESHMAN: NATIONAL NORMS FALL 2015, at 7–8, http://www.heri.ucla.edu/monographs/TheAmericanFreshman2015.pdf [https://perma.cc/L6LJ-48MP]; *see also* Courtney Kueppers, *Today's Freshman Class Is the Most Likely To Protest in Half a Century*, CHRON. HIGHER EDUC. (Feb. 11. 2016), http://chronicle.com/article/Today-s-Freshman-Class-Is/235273 (on file with *Ohio State Law Journal*).

on the other hand, they can choose to craft policies that recognize the value of student voices. I argue for the latter. Student activism should be viewed as a developmental component of student learning. As such, protecting student activism through academic freedom is entirely consistent with the AAUP's 1967 Joint Statement's focus on *Lernfreiheit*—the students' freedom to learn.[294] Thus, college and university administrators should take students' protest rights—framed as an academic freedom right to learn—into account in developing their free speech policies. I propose a balancing test for this purpose. This test could be applied to many tactics of student activists—from interrupting classes to painting political messages on campus buildings to staging die-ins on campus sidewalks. However, to illustrate my proposal, I present two specific tactics that have spurred targeted university policy responses—speaker interruption and building occupation.

1. *Speaker Interruption*

In recent years, student activists for racial justice have occasionally interrupted speakers to show their strong dissent, sometimes even shutting down the events through their disruption.[295] I believe that the invited speakers at these events should be allowed to finish their presentations; however, instead of advocating for a bright-line rule that bans all interruption, I wish to propose a balancing test included in campus policies that takes into account the student protestors' academic freedom along with the rights of invited speakers and audience members. To be clear, I am not arguing for a university-imposed prohibition on speech that students find objectionable. Indeed, I would urge students to engage in activism over asking the administration to censor speech. Further, I am not arguing that students have the right to terminate events that feature speakers that the students strongly disagree with. Instead, I am arguing for a balancing test in campus-speech disputes that takes into account multiple competing interests. Two institutions have attempted such a balance in their policies—Harvard Law School and the University of Michigan.

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[294] *See 1967 Joint Statement*, *supra* note 213, at 366.

[295] *See, e.g.*, Jillian Lanney & Carolynn Cong, *Ray Kelly Lecture Canceled Amidst Student, Community Protest*, BROWN DAILY HERALD (Oct. 30, 2013), http://www.browndailyherald.com/2013/10/30/ray-kelly-lecture-canceled-amidst-student-community-protest/ [https://perma.cc/3X74-UQLP]; Eugene Volokh, *Speech by Conservative Speaker Milo Yiannopoulos Shut Down by Protestors at DePaul—Police and Security Don't Intervene*, WASH. POST (May 25, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/25/speech-by-conservative-speaker-milo-yiannopoulos-shut-down-by-protesters-at-depaul-police-and-security-dont-intervene/ (on file with *Ohio State Law Journal*).

a. *Harvard Law School's Policy*

Harvard Law School's protest and dissent policy is an attempted balance of multiple interests.[296] In addressing the balancing of rights at events featuring invited speakers, the policy begins:

> The right to dissent is the complement of the right to speak, but these rights need not occupy the same forum at the same time. The speaker is entitled to communicate her or his message to the audience during her or his allotted time, and the audience is entitled to hear the message and see the speaker during that time. A dissenter must not substantially interfere with a speaker's ability to communicate or an audience's ability to see and hear the speaker.[297]

In addressing noise and the audience's responsibility, the policy continues:

> Responding vocally to the speaker, spontaneously and temporarily, is generally acceptable, especially if reaction against the speaker is similar in kind and degree to reaction in his or her favor. Chanting or making other sustained or repeated noise in a manner which substantially interferes with the speaker's communication is not permitted, whether inside or outside the meeting.
>
> . . . .
>
> The audience, like the host and the speaker, must respect the right to dissent. A member of the audience or the host organization who substantially interferes with acceptable dissent is violating these guidelines in the same way as a dissenter who violates the rights of the speaker or audience.[298]

Harvard Law School's policy is an attempt to balance the interests of: 1) the invited speaker; 2) the protestor; and 3) the non-protesting audience member. Under the policy, a protestor will not be allowed to substantially interfere with a speaker, but his or her right to dissent is taken into consideration in the balance. Thus, a spontaneous and temporary outburst is an acceptable form of expression, while sustained and repeated chanting is not.[299] Also, the audience is not allowed to violate the rights of the protestor to express dissent.[300] This explicit protection of protestor's right is crucial because it acknowledges that this form

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[296] Allan R. Gold, *Education; At Harvard, Guidelines on Speech and Dissent*, N.Y. TIMES (Oct. 12, 1988), http://www.nytimes.com/1988/10/12/us/education-at-harvard-guidelines-on-speech-and-dissent.html (on file with *Ohio State Law Journal*) ("Sarah Wald, the law school's dean of students, said the new guidelines were 'an attempt to balance the rights of speakers with the rights of people to protest and dissent.'").

[297] *Protest and Dissent Guidelines*, HARV. L. SCH., http://hls.harvard.edu/dept/dos/student-orgs/handbook-for-officers/protest-and-dissent-guidelines/ (on file with *Ohio State Law Journal*).

[298] *Id.*

[299] *Id.*

[300] *Id.*

of expression is worthy of protection. The First Amendment does not apply to Harvard Law School because it is not a state actor.[301] Therefore, if this policy creates any binding obligations, then they may be enforceable in contract law.[302]

b. *University of Michigan's Policy*

The University of Michigan, in a free speech policy that applies to events with invited speakers or artists, also attempts to balance a number of competing interests that includes the freedom of the protestors.[303] The policy provides:

> Within the confines of a hall or physical facility, or in the vicinity of the place in which a member of the University community, invited speaker, or invited artist is addressing an assembled audience, protesters must not interfere unduly with communication between a speaker or artist and members of the audience. This prohibition against undue interference does not include suppression of the usual range of human reactions commonly displayed by an audience during heated discussions of controversial topics. Nor does this prohibition include various expressions of protest, including heckling and the display of signs (without sticks or poles), so long as such activities are consistent with the continuation of a speech or performance and the communication of its content to the audience.[304]

The policy then explicitly recognizes the rights of protestors:

> Protesters have rights, just as do speakers and artists. The standard of "undue interference" must not be invoked lightly, merely to avoid brief interruptions, or to remove distractions or embarrassment. The University has an obligation to provide members of the community, and invited speakers and artists, with personal security and with reasonable platforms for expression; moreover, it has an obligation to insure audience access to public events. The University does not, however, have the obligation to insure audience passivity. The University cannot accept stipulations by invited speakers or artists of terms of appearance that are inconsistent with allowing full freedom of expression to the University community.[305]

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[301] Krohn v. Harvard Law Sch., 552 F.2d 21, 23–25 (1st Cir. 1977) (holding that Harvard Law School is not a state actor).

[302] *See, e.g.*, Walker v. President & Fellows of Harvard Coll., 82 F. Supp. 3d 524, 528 (D. Mass. 2014) ("'[A]n entering student forms a contractual relationship with her university'. . . . Contracts between students and universities are interpreted 'in accordance with the parties' reasonable expectations, giving those terms the meaning that the university reasonably should expect the student to take from them.'" (citations omitted)).

[303] *Standard Practice Guide Policies: Freedom of Speech and Artistic Expression*, U. MICH. (Apr. 1, 1993), http://www.spg.umich.edu/policy/601.01 [https://perma.cc/JS6F-VC2G].

[304] *Id.*

[305] *Id.*

The University of Michigan's policy, like Harvard Law School's, acknowledges and attempts to balance a number of potentially conflicting interests. It goes further than Harvard's in protecting protestor rights because it explicitly allows "heckling" as long as the speech is allowed to continue.[306] It also permits brief interruptions and even outbursts that can cause distraction or embarrassment.[307] The University of Michigan, as a public entity, is a state actor; thus, the First Amendment applies to its policies. However, Michigan courts have been reluctant to frame the university–student relationship as contractual.[308]

While Harvard Law School and the University of Michigan are going in the right direction, I would urge that such statements should also incorporate the 1967 Joint Statement to their policies in order to provide a theoretical foundation for the student protestor's right to dissent. In particular, the policies should include the statement's focus on the students' freedom to learn as well as how the institutions benefit from student dissent.[309]

2. *Building Occupation*

Another tactic that student activists for racial justice have used is occupying buildings, specific offices, and other noncommon spaces on campus without official permission in order to draw attention to their demands. For example, in February 2015, thirteen students were arrested at the University of Minnesota after staging a seven-hour sit-in at the university president's office.[310] The students had a list of eight demands related to racial and gender equity and inclusion: 1) "More faculty for the Department of Chicano and Latino Studies;" 2) "The removal of racial descriptors from campus police crime alerts;" 3) "The reversal of the decision to close the Postsecondary Teaching and Learning Department by 2016–17;" 4) "More faculty of color;" 5) "A program to recruit low-income Twin Cities high schoolers;" 6) "A requirement that all students take at least one ethnic studies class;" 7) "A gender-neutral restroom in every building;" and 8) "The removal of admissions application questions concerning

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306 *Id.*

307 *Id.*

308 *See, e.g.*, Amaya v. Mott Cmty. Coll., No. 186755, 1997 WL 33353479, at *1 (Mich. Ct. App. Mar. 7, 1997) ("Indeed, both state and federal courts have stated that under Michigan law contract and promissory estoppel claims brought by a student against a college or university fail."). In states that refuse to recognize contractual obligations between students and their universities, one would expect that universities would follow their own policies and rules. At least one state permits challenges to universities, both private and public, through a statutory mechanism that protects people from arbitrary and capricious decisions made by such institutions. *See* N.Y. C.P.L.R. §§ 7801–06 (McKinney 2008).

309 *See supra* Part V.B.

310 *See* Tad Vezner, *13 Arrests End Student Sit-In at UMN President's Office*, TWIN CITIES PIONEER PRESS (Feb. 10, 2015), http://www.twincities.com/2015/02/10/13-arrests-end-student-sit-in-at-umn-presidents-office/ [https://perma.cc/PWZ4-H5PN].

criminal history and school discipline, including expulsions."[311] Similar occupations of campus buildings around the country were frequent in the 2015–2016 academic year.[312]

Most free speech policies simply prohibit any unauthorized building or office occupancy.[313] However, in crafting speech policies or disciplining

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[311] *Id.*

[312] *See, e.g.*, Josh Logue, *Protest and Power at Duke*, INSIDE HIGHER ED (Apr. 7, 2016), https://www.insidehighered.com/news/2016/04/07/duke-tries-end-protest-has-occupied-administration-building-days [https://perma.cc/A4W9-TUAE] (detailing student protestors at Duke occupying the central administrative building after a parking attendant accused the university's executive vice president of hitting her with his car and using a racial slur); Claire E. Parker, *Law School Activists Occupy Student Center*, HARV. CRIMSON (Feb. 17, 2016), http://www.thecrimson.com/article/2016/2/17/activists-occupy-wasserstein/ [https://perma.cc/8X2A-Q9NG] ("Student activists began to occupy a portion of Harvard Law School's Caspersen Student Center Monday evening in an effort to create a space on campus they say has been denied to minorities at the school. Calling the lounge 'Belinda Hall' after a former slave of prominent Law School benefactors, the group of activists led by Reclaim Harvard Law said they plan to remain there indefinitely."); Alisha A. Pina, *Providence College Students Occupy President's Office*, PROVIDENCE J. (Feb. 16, 2016), http://www.providencejournal.com/article/20160216/NEWS/160219449 [https://perma.cc/C224-NCBE] ("More than 50 students of many ethnic backgrounds occupied the reception room of Providence College President Rev. Brian J. Shanley's office Tuesday to demand improvements to what they characterize as 'anti-blackness and racism on campus.'"); Pat Schneider, *Student Protesters Occupy UW-Madison's College Library, Demand End to Graffiti Case*, CAP. TIMES (Apr. 21, 2016), http://host.madison.com/ct/news/local/education/university/student-protesters-occupy-uw-madison-s-college-library-demand-end/article_503ab154-39ee-59f7-a3b6-7db55fb90333.html [https://perma.cc/A3HY-Z4NX] (detailing student protestors at University of Wisconsin-Madison occupying a campus library after a student was arrested in class for spray painting anti-racist messages across campus); Jason Song & Teresa Watanabe, *After Days of Protest, Students Occupy Building at Occidental College*, L.A. TIMES (Nov. 16, 2015), http://www.latimes.com/local/education/la-me-college-race-20151117-story.html [https://perma.cc/C224-NCBE] ("After several days of protesting Occidental College's handling of diversity issues, students occupied an administrative building Monday, demanding that the school president step down if officials don't take such steps as creating a black studies major and hiring more minority faculty."); Susan Svrluga, *Princeton Protesters Occupy President's Office, Demand 'Racist' Woodrow Wilson's Name Be Removed*, WASH. POST (Nov. 18, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/11/18/princeton-protesters-occupy-presidents-office-demand-racist-woodrow-wilsons-name-be-removed/ [https://perma.cc/CU94-8K98] ("Student protesters filled Princeton's historic Nassau Hall Wednesday afternoon, sitting in the university president's office and refusing to leave until their demands to improve the social and academic experiences of black students on campus are met—starting with an acknowledgement of famous alumnus Woodrow Wilson's 'racist legacy' and the removal of his name from all buildings.").

[313] For example, a recently proposed free speech policy at the City University of New York gives the following examples of prohibited activities during a demonstration: 1) "overnight camping on university property;" and 2) "occupying or remaining on any property or facility owned or operated by the university after receiving due notice to depart." Maxine Joselow, *Safeguarding Free Speech*, INSIDE HIGHER ED (June 20, 2016), https://www.insidehighered.com/news/2016/06/20/cuny-considers-free-speech-policy [https://perma.cc/NP4K-W5YN].

students who violate building occupancy rules through their protests, I again argue that the student's academic freedom rights of protest and dissent should be taken into account. This balancing should recognize the protestor's rights, other students' rights, and safety considerations. One possible application of this balancing test would treat students who occupy buildings as an act of protest with leniency when neither physical harm is committed nor significant property damage inflicted. If the students interfere with university operations—either administrative activities or teaching—then their rights to protest should be balanced with those affected by the occupation. Perhaps minor interference would be permitted, as determined on a case-by-case basis. However, serious and prolonged interference would not. As part of my framework, this balancing of interests would necessarily consider the student activists' freedom to engage in public expressions of dissent and how these expressions can help educate the campus on numerous issues.

My proposed balancing test is not limited to seizures of physical space. It would also apply to seizures in cyberspace. Specifically, a balancing of interests would be used in situations where student activists temporarily interrupt the operation of websites or seize different types of electronic data such as emails or cause other types of disruption in cyberspace. Although this has not been a prominent form of protest activity, I think it is reasonable to anticipate that student activists will use evolving technology along with their increased technical savvy in this way sometime in the near future. Students would not be shielded from institutional discipline in every situation, but they would be in some. And at the very least, the learning principle contained in student academic freedom will be part of the balancing.

This balancing of multiple interests and rights shifts the discourse in a way that recognizes students as more than just passive receptacles of information who merely consume information provided by the institution. It acknowledges that students' experiences and perspectives contribute to learning and that their voices are worth listening to. Indeed, some higher education administrators are taking note of the students' demands and pursuing institutional reforms.[314] More should follow.

In sum, student activism is all about learning. Students who engage in protest learn from it as do students who observe it. Professors and institutions should also take such activism as an opportunity to learn. Henry Reichman,

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[314] *See* Sarah Brown, *How 3 College Presidents Are Trying To Move Their Campuses Past Racial Tensions*, CHRON. HIGHER EDUC. (Aug. 17, 2016), https://www.chronicle.com/article/How-3-College-Presidents-Are/237479 (on file with *Ohio State Law Journal*) (discussing administrative collaboration with students demanding racial equity and inclusion at Towson University, Oberlin College, and the University of Washington); Kirk Siegler, *Protesting Racial Bias, Students Trade Placards for Pillows*, NPR (Nov. 25, 2015), http://www.npr.org/2015/11/25/457231118/protesting-racial-bias-students-trade-placards-for-pillows (on file with *Ohio State Law Journal*) ("Protests over racial discrimination on college campuses are leading to some swift responses and pledges of reform by college administrators.").

AAUP's first vice president and chair of the association's Committee A on Academic Freedom and Tenure, in language that is worth quoting at length, writes about student activists:

> They will offend others even as they respond to deeper offenses against their own dignity. They may demonstrate indifference to the rights of others, as protesters everywhere always have. But, in doing so, they will learn. And that, it seems to me, is the essential point. Student academic freedom, in the final analysis, is about the freedom to learn. And learning is impossible without error.
>
> What is therefore most remarkable about today's student movements is not their alleged intolerance or immaturity. It is not their intemperance or supposed oversensitivity to insult and indifference. It is that they have begun to grapple with issues that their elders have resisted tackling for far too long. . . .
>
> But the university, and especially its faculty, must also be willing to learn from students. Faculty members should welcome the challenges the protesting students have posed. Student movements offer countless opportunities for students—as well as their teachers—to learn. To approach them in this way, in the spirit of the student academic freedom proclaimed and defined by the AAUP and its collaborators back in 1967, is therefore simply to fulfill our responsibility as educators. [315]

In sum, in order to embrace student activism as a learning opportunity for the university community, free speech policies should consider the learning principle articulated in the 1967 Joint Statement.[316] Otherwise, colleges and universities will be ignoring an essential part of academic freedom—that of the students.

VI. CONCLUSION

Student activism for racial equity and inclusion is on a historic rise on college and university campuses across the country. Students are reminding us that Black lives matter. They are bringing attention to the ways in which the normal operation of the legal system creates racial and other inequalities. They are critiquing the ways in which their experiences and perspectives are pushed to the margins in classrooms, on campuses, and in society.

In urging for university policies that allow for such activism to be moments of teaching and learning for all involved, I argue in this Article that student academic freedom to protest—conceived as a right to learn—should be seriously considered by institutional decision-makers when they are creating

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[315] Henry Reichman, *On Student Academic Freedom*, INSIDE HIGHER ED (Dec. 4, 2015), https://www.insidehighered.com/views/2015/12/04/what-does-student-academic-freedom-entail-essay [https://perma.cc/8BMB-RMQX].

[316] *See supra* Part IV.B.

rules and policies governing on-campus student dissent. Otherwise, student voices will be deemed irrelevant and protests will be unfairly reduced to unjustifiable outbursts by young people craving attention—something to be either tolerated as mere annoyances or extinguished as threats to order. But if administrators and professors take the time to listen to what students are saying and explore the issues underlying their grievances, much can be gained. I argue that colleges and universities move away from the question, "how do we stop our student activists," toward the question, "what are students learning from their activism and what, in turn, can the institutions learn from it?"

As I have posited in this Article, one way to start the process of learning from what student activists have to say is to include students' rights in a balancing test when speech is disputed—e.g., in student protests involving invited speaker interruption, unauthorized building and office occupation, and even various forms of disruption in cyberspace. Such a test should be articulated in university policies and made binding through contract law. While student protestors may not always win in the balancing, at least their academic freedom right to learn, and I would argue teach others, will be part of the conversation. My hope is that recognition that student protest has positive value to the university community and is an essential part of academic freedom will begin to shift attention to the substantive issues underlying student grievances. In this way, student activism will truly be an opportunity for all to learn.